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UNITED STATES REPORTS

VOLUME 272

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1926

FROM OCTOBER 4, 1926 TO AND INCLUDING IN PART JANUARY 3, 1927

ERNEST KNAEBEL
REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

WILLIAM HOWARD TAFT, Chief Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.
HARLAN FISKE STONE, Associate Justice.

JOHN G. SARGENT, Attorney General.
WILLIAM D. MITCHELL, Solicitor General.
WILLIAM R. STANSBURY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see p. IV, *post*.

135416

SUPREME COURT OF THE UNITED STATES

October Term, 1926 [1]

Order of Allotment of Justices

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Fourth Circuit, William H. Taft, Chief Justice.

For the Fifth Circuit, Edward T. Sanford, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Pierce Butler, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

March 16, 1925.

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[1] For next previous allotment, see 268 U. S., p. IV.

SUPREME COURT OF THE UNITED STATES.

MONDAY, NOVEMBER 22, 1926.

PRESENT: THE CHIEF JUSTICE, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER, MR. JUSTICE SANFORD, and MR. JUSTICE STONE.

THE CHIEF JUSTICE announced:

It becomes the sad duty of the court to announce that, since its last adjournment, Mr. Justice McKenna, recently retired from this court, has passed away. His death occurred at 1.45 a. m. yesterday. No one who was present will forget the affecting scene and farewell in 1925 when the justice in this room took his leave of the court and his colleagues. As a mark of love and a tribute of respect for his twenty-seven years of distinguished and useful service on this bench, the court will, after the delivery of opinions this morning, adjourn until Tuesday noon, and will attend the funeral to be held this day at his late residence in the city at 3 p. m.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1926.

UNITED STATES *v.* CHEMICAL FOUNDATION, INC.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 127. Argued December 9, 10, 11, 1925.—Decided October 11, 1926.

1. A decree of the Circuit Court of Appeals, entered prior to the taking effect of the Jurisdictional Act of February 13, 1925, and affirming dismissal on the merits of a bill by the United States to set aside, as unauthorized and fraudulently procured, sales of patent and other rights and properties seized pursuant to the Trading with the Enemy Act, was reviewable by this Court on appeal (Jud. Code §§ 128, 241). Certiorari denied. P. 5.
2. The purpose of the Trading with the Enemy Act was not only to weaken enemy countries by depriving their supporters of their properties, but also to promote production in the United States of things useful for the effective prosecution of the war. P. 9.
3. The Act should be construed liberally to effect its purposes. P. 10.
4. Congress has power to authorize seizure, and use or appropriation, of enemy properties without compensation to their owners. P. 11.
5. Where German properties were seized and sold under the Trading with the Enemy Act, the Act, (including its provision that, after war, enemy claims shall be settled as Congress shall direct,) gave the former owners no rights in, or to question the adequacy of, the proceeds of sale. Moreover, the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its nationals, on account of such seizures and sales. P. 11.
6. The Act, as amended, (§ 12,) vested the Alien Property Custodian with the powers of a "common law trustee" over all

property other than money taken over by him, with power, under the President, to make any disposition of it, "by sale or otherwise," and to exercise any appurtenant rights or powers "in like manner as though he were the absolute owner." A proviso regulated sales, requiring, *inter alia,* that they be public, to the highest bidder,—"unless the President, stating the reasons therefor, in the public interest shall otherwise determine."

Held:

(1) That a disposition of enemy patents, made at private sale to a corporation organized for the purposes of taking over and holding them as a trustee for American industries affected, of eliminating hostile alien interests and advancing chemical and allied industries in the United States through licenses under the patents free to the United States and upon equal terms to others, was within the authority granted by the Act to the President and the Custodian. P. 9.

(2) That empowering the President thus to determine the terms of sale of enemy properties in the light of conditions arising in the progress of the War, was not an unconstitutional delegation of legislative power. P. 12.

7. Under § 5a, providing that the President may exercise any power conferred on him by the Act "through such officer or officers as he shall direct," the power to determine how enemy property should be sold could be delegated; and this also is constitutional. P. 13.

8. An order of the President under § 5a is not invalid because it purports to "vest" the power in another, instead of "to act through" him, nor because of its failure to show that he was an officer, when he was in fact such, appointed by the President and confirmed by the Senate. P. 13.

9. Orders made by the President's delegate describing enemy patents which had been seized by the Alien Property Custodian, and authorizing private sale thereof to the defendant "Foundation," *held* valid exercise of the President's power under § 12 of the Act. P. 14.

10. Evidence claimed to show that such orders were induced by misrepresentation and made without knowledge of material facts, will not be reëxamined in face of concurrent findings of two courts below to the contrary. P. 14.

11. Such orders are supported by the presumption of official regularity, and the validity of reasons stated therein, or the basis of fact on which they rest, will not be reviewed by the courts. P. 14.

1 Statement of the Case.

12. Order of the President *held* to have ratified and confirmed sales and transfers of patents made by the Alien Property Custodian. P. 15.
13. In making such an order, the President is presumed to have known, and acted in the light of, the material facts. P. 16.
14. Section 41 of the Criminal Code lays down a general rule for the protection of the United States in transactions between it and corporations and to prevent its action from being influenced by anyone interested adversely to it. It is a penal statute and is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose. P. 18.
15. Section 41 of the Criminal Code is inapplicable to affect the validity of transactions carried out under authority conferred on the President by the Trading with the Enemy Act, whereby enemy patents were transferred, for prices less than their commercial value, from the Alien Property Custodian, to the "Chemical Foundation," a corporation, created as an instrumentality to receive and subsequently control the patents in the public interest, the Custodian being the president of the company, and others representing the Government being also representatives of the corporation, but none of them interested in it financially. P. 17.
16. In such case the rule forbidding sale of trust property by the fiduciary to himself or to a corporation of which he is the head does not apply. P. 20.
17. In absence of statutory authority, stenographers' fees and expense of printing transcripts can not be adjudged against the United States. P. 20.
18. This immunity from costs is a sovereign prerogative which can not be waived by the Attorney General or other government counsel in the case. P. 21.
19. Equity Rule 50 does not attempt to allow taxation of stenographers' fees against the United States. P. 20.

5 Fed. (2d) 191, modified and affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court (294 Fed. 300) dismissing the bill, on final hearing, in a suit brought by the United States to set aside transactions whereby patents, copyrights, etc., which had been seized as enemy property, were transferred to the defendant corporation by the Alien Property Custodian,

acting, by direction of the President, under authority conferred by the Trading with the Enemy Act.

Mr. Henry W. Anderson, Special Assistant to the Attorney General, and *Assistant Attorney General Galloway,* with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. John W. Davis, with whom *Messrs. Moorfield Storey, Joseph H. Choate, Jr., William G. Mahaffy,* and *Seiforde M. Stellwagen* were on the brief, for appellee.

Mr. James A. Beha filed a brief as *amicus curiae* by special leave of Court, on behalf of Friedrich Schott.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Suit was brought by the United States in the District Court for Delaware to set aside sales made by it to the Chemical Foundation of a number of patents, copyrights, trademarks, and other similar properties—which for brevity will be referred to as "patents"—seized pursuant to the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, as amended by the Act of March 28, 1918, c. 28, 40 Stat. 460, and the Act of November 4, 1918, c. 201, 40 Stat. 1020, and other Acts. The complaint alleges that a number of domestic manufacturers as a result of war conditions had been able to combine and monopolize certain chemical industries in this country; and, fearing that at the end of the war German competition would destroy the monopoly, they conspired to bring about transfers and sales of the patents at nominal prices to themselves or to a corporation controlled by them; that the patents so obtained would control the industries in question and perpetuate the monopoly, and that the sales were procured through the fraudulent deception of the President, the Alien Property Custodian, and other offi-

cials. The answer denies conspiracy and fraud and asserts that the transfers were made in good faith and pursuant to law and that they are valid. There was a trial at which much evidence was taken. The District Court dismissed the complaint (294 Fed. 300); and its decree was affirmed by the Circuit Court of Appeals. 5 F. (2d) 191. Both courts found that no unlawful scheme, combination or conspiracy was shown, and that there was no deception or fraud. The United States took an appeal under § 241, Judicial Code, and has applied for a writ of certiorari under § 240. The decree of the Circuit Court of Appeals was entered March 26, 1925, prior to the taking effect of the Act of February 13, 1925, amending the Judicial Code. C. 229, 43 Stat. 936. Since this is not a case in which the decree of that court is made final by § 128, the United States had the right of appeal. The application for certiorari is therefore denied.

The chemical industries in question are closely related to the production of explosives, gases, and other things directly used in waging war, as well as the production of dyestuffs and medicines essential to the welfare of the people. At the outbreak of the war many necessary medicines and other substances as well as most of the dyestuffs used in this country were imported from Germany or were manufactured under patents owned by enemy Germans. The amount of such things here produced was small. Importations were hindered by the blockade, and ceased when this country entered the war. To meet the demand, numerous plants were developed, and, by 1919, chemicals, dyestuffs, medicines and the like were being produced here in large quantities. A number of associations of manufacturers were formed for the advancement of such industries; they included in their membership the producers of nearly all the dyestuffs and like chemicals made in this country. Mr. A. Mitchell Palmer was the Alien Property Custodian until he was

appointed Attorney General, March 4, 1919. In order to protect the United States against enemy and foreign control of its chemical industries and to stimulate production here, he favored the seizure and sale of the patents in question. To that end, a number of conferences were held between his representatives and those of the industries. The plan that was carried into effect was formulated under his direction.

In February, 1919, the Chemical Foundation was incorporated under the laws of Delaware. The certificate of incorporation discloses that it was created and empowered to purchase enemy-owned patents seized by the Custodian and to hold the "property and rights so acquired in a fiduciary capacity for the Americanization of such industries as may be affected thereby, for the exclusion or elimination of alien interests hostile or detrimental to the said industries, and for the advancement of chemical and allied science and industry in the United States"; to grant to the United States non-exclusive licenses to make, use and sell the inventions covered by the patents, and also to grant like licenses, on equal terms and without advantage as between licensees, to American citizens and corporations under control of American citizens. The board of directors is authorized to prescribe the terms and conditions of such licenses. It may refuse to issue any license or may revoke any license granted by it. The corporation is required to enforce its rights and to protect the rights of its licensees. The authorized capital stock is $500,000, consisting of 5,000 shares of the par value of $100 each; 4,000 shares constitute non-voting preferred stock, the holders of which are entitled to a cumulative dividend of six per centum per annum, and 1,000 shares constitute the common stock, the holders of which are entitled to dividends not exceeding six per centum per annum after dividends on the preferred stock have been provided for. The preferred stock is subject to redemption at par plus

accumulated dividends, if any, and after such redemption net earnings not needed for working capital "shall be used and devoted to the development and advancement of chemistry and allied sciences, in the useful arts and manufactures in the United States, in such manner as the board of directors may determine." The holders of the common stock have all the voting power. The certificate provides that, without the approval of the board of directors, stockholders may not sell any of their stock. The board of directors consists of three members. The executive officers are president, vice president, and a secretary and treasurer. The president and vice president are required to serve without pay. The shares of the Foundation were subscribed by those interested in the chemical and dye industries. But a voting trust agreement was made, pursuant to which all common stock was deposited with, and all voting power was vested in, five trustees. Directors and officers were chosen March 8, 1919. Francis P. Garvan, Douglas I. McKay and George J. Corbett were made directors and constituted the board. Mr. Garvan, then Alien Property Custodian, was elected president. Mr. McKay was elected vice-president, and Mr. Corbett secretary and treasurer. Otto T. Bannard and four others were made voting trustees. All the directors, officers and voting trustees were chosen by or in accordance with the direction of Mr. Palmer, given while he was Custodian.

The President, by executive order, December 3, 1918, declared: "I hereby vest in Frank L. Polk all power and authority conferred upon the President by the provisions of Section 12" of the Trading with the Enemy Act as amended. Mr. Polk was then Counselor for the Department of State, but was not so described in the order. He made two orders, dated respectively February 26, 1919 and April 5, 1919, to authorize the Custodian to sell at private sale to the Foundation, without advertisement, at such places and upon such terms and conditions as to the

Custodian might seem proper, all patents found to relate to the objects and purposes of the Foundation as expressed in its charter. These orders contained a statement of the reasons therefor in the public interest. Briefly they were: that the patents could not be sold to the best advantage at public sale after advertisement; that the Foundation had been incorporated to hold the patents as a trustee for American industries affected by the patents, to eliminate hostile alien interests, and to advance chemical and allied industry in the United States, and that it was obligated to grant non-exclusive licenses upon equal terms to qualified American manufacturers and was empowered to grant free licenses to the United States; that the public interest would be best served by a wide use of the inventions, which most readily could be promoted by licenses which the Foundation was obligated to grant; that a private sale would prevent the patents from falling into the hands of purchasers unwilling or unable to use the inventions, or who would use them for speculative purposes; that it would be impossible to make a public sale that would secure these benefits, and that a private sale would avoid unnecessary expense, delay and inconvenience.

Prior to and contemporaneously with the organization of the Foundation, the representatives of the chemical industries coöperated with those of the Custodian in making lists of the patents to be seized, and sold by the Custodian to the Foundation. Mr. Garvan, the Custodian, from time to time commencing April 10, 1919, executed and delivered to the Foundation various assignments of the patents. The considerations paid by the Foundation to the Custodian amounted in all to $271,850.00. The President, February 13, 1920, made an executive order which was held by both courts below to constitute a ratification of the transactions. And, pursuant to that order, the Custodian confirmed the assignments theretofore made.

We come to the question whether, as held below, the Act, as amended March 28, 1918, empowered the President to authorize, and the Custodian under his supervision to consummate, these sales.

The pertinent provisions of the Act are in § 12 as amended. "The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: . . . [40 Stat. 460].

"After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: . . ." 40 Stat. 424.

It is conceded that when seized the patents belonged to enemy Germans and that they were lawfully taken over by the Custodian. The purpose of the Trading with the Enemy Act was not only to weaken enemy countries

by depriving their supporters of their properties, (*Miller* v. *Robertson,* 266 U. S. 243, 248), but also to promote production in the United States of things useful for the effective prosecution of the war. Section 10(c) authorized the President, if he deemed it for the public welfare, to grant licenses to American citizens or corporations to use any inventions covered by enemy-owned patents. Subsection (c) of § 7 of the Act, as amended November 4, 1918, authorized the seizure of enemy-owned patents and provided that all property so acquired should be held and disposed of as provided by the Act. And there is no ground for contending that the seizure and transfers did not tend to lessen enemy strength and to encourage and safeguard domestic production of things essential to or useful in the prosecution of the war. There is nothing to support a strict construction of the Act in respect of the seizure and disposition of enemy property. On the other hand, contemporaneous conditions and war legislation indicate a purpose to employ all legitimate means effectively to prosecute the war. The law should be liberally construed to give effect to the purposes it was enacted to subserve.

As originally enacted, § 12 gave the Custodian in respect of properties in his possession "all of the powers of a common-law trustee." He was authorized, acting under the supervision and direction of the President and under rules and regulations prescribed by the President, to manage the property and do any act or things in respect thereof, or make any disposition of it by sale or otherwise, and to exercise any rights appurtenant to its ownership, "if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights, or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded." The Custodian was a mere conservator and

was authorized to sell only to prevent waste. But brief experience made it clear that this restriction on the power to dispose of enemy property sometimes operated to defeat the purpose of the Act and brought profit and advantage to the enemy. The amendment of March 28, 1918, eliminated the restriction upon the power of sale. It stated that the other powers given were "in addition" to those of a common-law trustee. And it authorized the Custodian, under the President, to dispose of such properties by sale or otherwise "in like manner as though he were the absolute owner thereof."

There is no support for a construction that would restrain the force of the broad language used. Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners. There is no constitutional prohibition against confiscation of enemy properties. *Brown* v. *United States,* 8 Cranch 110, 122; *Miller* v. *United States,* 11 Wall. 268, 305, *et seq.; Kirk* v. *Lynd,* 106 U. S. 315, 316; *Stoehr* v. *Wallace,* 255 U. S. 239, 245; *White* v. *Mechanics Securities Corp.,* 269 U. S. 283, 300. And the Act makes no provision for compensation. The former enemy owners have no claim against the patents or the proceeds derived from the sales. It makes no difference to them whether the consideration paid by the Foundation was adequate or inadequate. The provision that, after the war, enemy claims shall be settled as Congress shall direct conferred no rights upon such owners. Moreover, the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its nationals on account of the seizures and sales in question.*

While not denying the power to confiscate enemy properties, the United States argues that, as construed below,

*Part X, Section IV, Article 297, and Annex paragraphs 1 and 3, Treaty of Versailles, adopted by Article II(1), Treaty of Berlin, 42 Stat. 1939, 1943.

the provision in question is unconstitutional because it attempts to delegate legislative power to the Executive. But the Act gave the Custodian, acting under the President, full power of disposition. No restriction was put upon dispositions other than by sales. And sales to the United States were not regulated. The general rule laid down was, that all dispositions by sale or otherwise should be made in accordance with the determinations of the President; the proviso made an exception including a class of sales; and, upon the failure of the President otherwise to determine stating the reasons therefor in the public interest, it required that such sales should be made as there specified. It was not necessary for Congress to ascertain the facts of or to deal with each case. The Act went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power. *Field* v. *Clark,* 143 U. S. 649, 692; *Buttfield* v. *Stranahan,* 192 U. S. 470, 496; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 377; *United States* v. *Grimaud,* 220 U. S. 506, 516.

The language of the statute is too plain to be misunderstood. Except as affected by the proviso, the Custodian's dominion over the property, and power to dispose of it—acting under the President as provided—were as unlimited as are the powers of an absolute owner; and the power of the President to determine terms and

conditions of sales or other disposition was not restricted. He was authorized, stating the reasons therefor in the public interest, to dispense with any or all requirements specified in the proviso and to substitute others for them. Cf. *Levinson* v. *United States*, 258 U. S. 198. When the amended section is read in comparison with the original enactment and regard is had to the chemical warfare and other conditions existing at the time of the amendment, March 28, 1918, the inevitable conclusion is, that it empowered the President to authorize, and the Custodian acting under him to consummate, the sales in question.

The United States argues that the executive order of December 3, 1918 was void, and that the one of February 13, 1920 did not authorize or ratify the transactions.

Section 5 (a) of the Act provides that "the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct." The language of the executive order is: "I hereby vest in Frank L. Polk all power and authority conferred upon the President by the provisions of Section 12 . . ." Obviously all the functions of his great office cannot be exercised by the President in person. The contention that power to determine how enemy property should be sold could not be delegated to another is not sustained. This court has had occasion to consider a like question in *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 567; *Stoehr* v. *Wallace*, *supra*, 244, and *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 53. These decisions sustain the delegation here involved.

It is argued that the order was not made in conformity with the statute because to "vest" power in another is not to "act through" him, and because the order did not show that Mr. Polk was an officer. But, if two constructions are possible, and one of them would render the order useless and the other give it validity, the latter is to be adopted. Cf. *Panama R. R. Co.* v. *Johnson*, 264 U. S.

375, 390; *United States* v. *Coombs,* 12 Pet. 72, 75–76. The intention to exert the power conferred under § 5 is plain. Meticulous precision of language was not necessary. *Russell Co.* v. *United States,* 261 U. S. 514, 523. While the use of the word "vest" was not accurate, it must be deemed sufficient when the context and circumstances are considered. Mr. Polk was an officer through whom the President was authorized to act. He was Counselor for the Department of State, appointed by the President and confirmed by the Senate. *United States* v. *Germaine,* 99 U. S. 508. No particular form of designation was required. It would be unreasonable to read the order otherwise than as meaning that, in respect of the matters covered by § 12, the President determined to act through Frank L. Polk, Counselor for the Department of State.

And the validity of each of the orders made by Mr. Polk is attacked by the United States on the ground that it was too broad and constituted an attempt to give to the Custodian the very power granted to the President by the Act; that is, the power to determine that enemy properties should be disposed of otherwise than as specified in the proviso. But the contention cannot prevail. Each of the orders sufficiently described the patents seized and authorized a private sale to the Foundation without advertisement. This was enough to indicate a determination to take these sales out of the class covered by the proviso. And it is insisted that the orders were induced by misrepresentation and were made without knowledge of the material facts. But both courts found that the United States failed to establish any conspiracy, fraud or deception alleged. Findings of fact concurred in by two lower courts will not be disturbed unless clearly erroneous. *Washington Sec. Co.* v. *United States,* 234 U. S. 76, 78. Under this rule the findings must be accepted. The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the

contrary, courts presume that they have properly discharged their official duties. *Confiscation Cases,* 20 Wall. 92, 108; *United States* v. *Page,* 137 U. S. 673, 679–680; *United States* v. *Nix,* 189 U. S. 199, 205. Under that presumption, it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts. *Dakota Cent. Tel. Co.* v. *South Dakota,* 250 U. S. 163, 184; *Monongahela Bridge* v. *United States,* 216 U. S. 177, 195; *Martin* v. *Mott,* 12 Wheat. 19, 30. Cf. *Levinson* v. *United States, supra,* 201.

We agree with the lower courts that the sales and transfers of the patents were ratified and confirmed by the President's order of February 13, 1920. It is urged that there was no ratification because it is not shown that the President had knowledge of the material facts; that he did not intend to ratify the sales of patents, and that the language used in the order is not broad enough to include the patents, trademarks and copyrights in question.

The Polk order of February 26, 1919, described the property covered as " all of the letters patent, trade-marks and rights under letters patent and trade-marks, including all profits and damages . . . for the past infringement thereof which the Alien Property Custodian may seize or may have seized .... and which he from time to time shall determine relate to the objects and purposes " of the Chemical Foundation. The President's order of confirmation recites that the Polk orders authorized the Custodian to sell " certain choses in action and rights, interests and benefits heretofore determined to belong to, or to be held for, by, or on account of, or for the benefit of persons heretofore determined to be enemies." The language last quoted was used to define the same properties that were covered by the Polk orders. That is, " choses in action and rights," etc., were used to

include "letters patent, trade-marks," etc. The President's order also states that it was the *intention* of the Polk orders to authorize the Custodian to sell "all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description including rights to receive moneys by way of royalties or otherwise as compensation for the use of patents, trademarks or tradenames which the Alien Property Custodian may have seized . . . and . . . determined to relate to the objects and purposes" of the Foundation. It recites that doubt had arisen as to the authority of the Custodian to sell and convey to the Foundation "certain of the said choses in action," etc., "including rights to receive moneys by way of royalties or otherwise." And the President expressly authorized the Custodian to sell at private sale without public or other advertisement to the Foundation upon such terms and conditions as to the Custodian might seem proper "all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description which the Alien Property Custodian may seize or may have seized" under the Act. The President further authorized the Custodian by a suitable instrument to confirm and ratify sales theretofore made by him of any property as to which his authority under the Polk orders might be deemed doubtful. And he stated that his reasons for the determination and order were given in the Polk orders and in addition specified other reasons which need not be quoted.

This order authorizes sales of the patents to be made and ratifies and confirms those theretofore made by the Custodian. The President will be presumed to have known the material facts and to have acted in the light of them. His intention to ratify the sales is plain. The comprehensive language used is broad enough to include the patents. Moreover, the statement that his reasons for the determination are given in the Polk orders shows

the intention to cover the properties there referred to. As the transactions in question were ratified, it is unnecessary to consider the objections made by the United States to the procedure of the Custodian under the Polk orders.

The United States contends that the sales were void because made in violation of § 41 of the Criminal Code, 35 Stat. 1088, 1097, and the rule of law forbidding sales by a public officer or fiduciary of trust property in his custody to himself or to a corporation of which he is the head.

Section 41 provides: "No officer or agent of any corporation . . . and no . . . person directly or indirectly interested in the pecuniary profits or contracts of such corporation . . . shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation . . ." Violators are made punishable by fine and imprisonment. The United States lays much stress on these facts: Mr. Garvan, while director of the bureau of investigation, Joseph H. Choate, Jr., chief of the chemical division of that bureau, and Ramsey Hoguet, patent attorney for the Custodian, conferred with the representatives of the chemical industries to arrange to make the seizures and sales of the patents. Later, Mr. Garvan, then Custodian, acted for the United States in making the transfers to the Chemical Foundation of which he was the President. Mr. McKay and Mr. Corbett were directors and officers appointed by the Custodian of various corporations of which he had taken control. Before the transfers were made, Mr. Choate became the general counsel and Mr. Hoguet the patent attorney of the Foundation. Mr. Bannard and the other voting trustees were members of the Advisory Sales Committee—appointed by the President to see that sales of enemy properties were fairly made to qualified buyers. Without further reference to the facts relied on to sup-

port its contention, we assume in favor of the United States that those who acted for it in the transactions complained of were at the same time directors and officers of the corporation; that the members of the Advisory Sales Committee, while they were voting trustees, participated in the fixing of the prices paid for the patents by the Foundation, and that such prices were much less than the value of the properties and would have been inadequate to constitute just compensation if the patents belonged to non-enemy owners and were taken for public use under the power of eminent domain.

Section 41 was enacted when there was no war, and long before the Trading with the Enemy Act. It lays down a general rule for the protection of the United States in transactions between it and corporations and to prevent its action from being influenced by anyone interested adversely to it. It is a penal statute and is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose. *United States* v. *Noveck*, 271 U. S. 201; *Baender* v. *Barnett*, 255 U. S. 224, 226; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *United States* v. *Kirby*, 7 Wall. 482, 486; Bishop on Statutory Crimes, (3d ed.), § 235. At the time of the enactment, there were no enemy properties to be dealt with; and, save the generality of the language used, there is nothing to indicate a legislative purpose to deal with that subject. The Trading with the Enemy Act is a war measure covering specifically, fully and exclusively the seizure and disposition of enemy properties. The authority of the President to authorize sales and to determine terms and conditions in lieu of those specified in the proviso, undoubtedly included the power to cause the Chemical Foundation to be incorporated to purchase and hold the patents, as specified, and to direct the selection of the directors, officers and voting trustees. The President, and under him the Custodian, acting for the United

States, the seller of the patents, caused the Foundation to be created to buy and hold them, and caused it to be controlled by officers or representatives of the United States acting exclusively in its interest. Neither Mr. Garvan nor any of the others who acted for the United States had any financial interest in the Foundation, its profits or its contracts. All the corporate shares were subscribed and paid for by others—those interested in the chemical industries. They furnished the money to carry out the plan formulated by or under the direction of Mr. Palmer while he was Custodian. Under the voting trust agreement, shareholders were divested of all voice in the control, business, or affairs of the corporation. All shares are to be held by the voting trustees for 17 years, within which all patents will expire. And, by charter provisions, dividends were limited to six per centum per annum. Transferable certificates of beneficial interest were issued by the trustees to the shareholders, but these cannot be used to control the corporation. The arrangement was intended to amount to a public trust for those whom the patents will benefit and for the promotion of American industries, and to give to them the right to have on equal and reasonable terms licenses to make, use and sell the inventions covered by the patents. The Foundation is properly to be considered an instrumentality created under the direction of the President to effect that disposition and subsequent control of the patents which he determined to be in the public interest. The transactions complained of did not involve any of the evils aimed at by § 41. The Act will be construed and applied as not qualified or affected by that provision of the Criminal Code. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 406; *Kepner* v. *United States,* 195 U. S. 100, 125; *Townsend* v. *Little,* 109 U. S. 504, 512; *In re Rouse, Hazard & Co.,* 91 Fed. 96, 100. And, as the power to dispose of the properties

by sales on the terms and conditions specified was included in the grant made by the statute, it follows that the rule in respect of sales of trust properties by fiduciaries does not apply.

Before the commencement of the trial, the District Court found that it was necessary that the testimony be taken down in shorthand and transcribed, and appointed an official stenographer for that purpose; and it was ordered that his fees be ultimately taxed as a part of the costs. By another order, counsel consenting, the court directed that the expense of printing 100 copies of the transcript, to be available for use in that court and on appeal, be advanced from time to time and borne in equal amounts by the parties and form a part of the taxable costs. The decree directs that the Chemical Foundation recover from the United States the money advanced by the Foundation on account of such fees and expenses, and orders the amount to be taxed as costs in the case. The government insists that this is erroneous.

The general rule is that, in the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses. *United States* v. *Hooe,* 3 Cranch 73, 91, 92; *Shewan and Sons* v. *United States,* 267 U. S. 86; *United States* v. *Davis,* 54 Fed. 147, 152, *et seq.* But the Foundation insists that under Equity Rule 50, taken with the consent of counsel and the orders, the court was authorized to direct that these items be taxed as costs and to give judgment against the United States therefor.

Equity Rule 50 in general terms provides that stenographers' fees shall be fixed by the court and taxed as costs, but it does not specify costs or judgment for money against the United States. The rule does not mention the United States and does not affect the sovereign prerogative not to pay costs. Congress alone has power to waive or qualify that immunity. But no statute author-

izes the giving of judgment against the United States for these items or authorizes the Attorney General or other counsel in the case to consent to such a judgment. No such authority is necessary for the proper conduct of litigation on behalf of the United States, and there is no ground for implying that authority. It follows that the direction for judgment against the United States for costs cannot be sustained. That part of the decree will be eliminated; and the decree, so modified, will be affirmed.

Decree modified and affirmed as modified.

MR. JUSTICE SUTHERLAND and MR. JUSTICE STONE took no part in the consideration or decision of this case.

OKLAHOMA *v.* TEXAS; UNITED STATES, INTERVENOR.

IN EQUITY.

No. 6, Original. Argued November 25, 1925.—Decided October 11, 1926.

1. The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and which it was intended to decide. P. 42.
2. In the "Greer County Case," (*United States* v. *Texas*, 162 U. S. 1), it was conclusively determined that the boundary line between Texas and the territories of the United States followed the line of the true 100th meridian from its intersection with the South Fork of Red River, but the precise location of the meridian line was left open. P. 39.
3. A boundary line between two governments which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by them for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the correct course; the line so established taking effect, in such case, as a definition of the true and ancient boundary. P. 44.

4. Upon the facts, it is found that the "Jones, Brown and Clark Line," run in 1859 and 1860 as a location of the 100th meridian between the south bank of the Red River and the parallel of thirty-six degrees thirty minutes north latitude, and claimed by Oklahoma to be the boundary between that State and Texas, has not been accepted and acquiesced in as the established boundary by the United States, Texas, or Oklahoma. P. 44.
5. *Quaere*, Whether twenty-four years' acquiescence by one State in the possession of territory under claim of right, and in the exercise of dominion and sovereignty over it, by another State, is sufficient in time to found a prescriptive right in the latter. P. 47.
6. The fact that the Territory and the State of Oklahoma in succession have continuously for twenty-four years enforced their civil and criminal laws over the area in dispute, does not establish the State's claim to it by prescription, in view of the fact that even during that period assertion of a claim of right (by the United States when Oklahoma was a territory,) on the one hand, and acquiescence therein (by Texas,) upon the other, were not continuous. P. 47.
7. Where, prior to the admission of Oklahoma to statehood, a federal surveyor, pursuant to an Act of Congress, attempted to locate the true intersection of the 100th meridian with the South Fork of the Red River, and marked the location by a monument, and this was approved by the Secretary of the Interior and adopted by Texas, but not by Congress, as marking the corner in the boundary, *held* that the facts did not sustain the claim of Texas that the boundary was thus established by acquiescence, as a line to be run north from the monument. P. 48.
8. The boundary between Oklahoma and the Panhandle of Texas is the line of the true 100th meridian extending north from its intersection with the south bank of the South Fork of Red River to its intersection with the parallel of thirty-six degrees and thirty minutes. P. 49.

Original suit brought by Oklahoma against Texas, to establish their boundary on the Red River. A number of opinions, orders, and decrees of the Court relative to that primary phase of the litigation have already been reported. The present opinion deals with another portion of the boundary which was brought into the case by the counterclaim of Texas. See 269 U. S. 314, 539, and other references in the opinion.

Messrs. Thomas W. Gregory and *R. H. Ward,* with whom *Messrs. C. W. Taylor, Orville Bullington, A. H. Carrigan, C. M. Cureton,* and *W. A. Keeling* were on the brief, for The State of Texas, on the counterclaim.

Mr. S. P. Freeling, with whom *Messrs. George F. Short* and *Edwin Dabney* were on the brief, for The State of Oklahoma.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Assistant Attorney General Parmenter* were on the brief, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by the State of Oklahoma against the State of Texas, in 1919, to settle a controversy between them over that portion of their common boundary extending westwardly along the course of the Red River from the southeast corner of Oklahoma to the 100th meridian of longitude west from Greenwich. This portion of the boundary line, it has been decided, extends along the south bank of the River. 256 U. S. 70 and 608; 258 U. S. 574.

The present controversy arises under a counterclaim filed by the State of Texas, in 1920. It relates to that portion of the boundary line extending northwardly along the 100th meridian from the Red River to the parallel of 36 degrees 30 minutes north latitude, which constitutes the eastern boundary of the Panhandle of Texas and the main western boundary of Oklahoma. The only dispute is as to the location of this line upon the ground. Different surveys have been made. On the one side, Oklahoma and the United States claim that the line is that which was surveyed and marked in 1859 by A. H. Jones and H. M. C. Brown as the line of the 100th meridian,

and retraced and extended in 1860 by John H. Clark; and, on the other side, Texas claims that it is a more easterly line, running north from a monument established, by Arthur D. Kidder in 1902 to mark the intersection of the meridian and the Red River.

Three separate contentions are made:

1. Oklahoma and the United States contend that by the decision and decree of this court in *United States* v. *Texas,* 162 U. S. 1, commonly called the *Greer County* case, it was conclusively determined and decreed that the boundary line followed the line of the meridian as surveyed and marked on the ground by Jones, Brown and Clark, and the matter thereby became *res judicata.* 2. Oklahoma contends that, independently of this adjudication, the Jones, Brown and Clark line has been recognized as the true location of the meridian through a long course of years and is established as the boundary line by acquiescence and by long continued exercise of jurisdiction over the strip in dispute. 3. Texas on the other hand, contends that a line running north from the Kidder monument is the established boundary.

By the treaty of 1819 between the United States and Spain [1] the boundary line established between the two countries followed the course of the Red River westward to the 100th degree of west longitude, and, crossing the Red River, ran thence due north to the Arkansas River; all " as laid down in Melish's map of the United States." The same line was established by the treaty of 1828 between the United States and the United Mexican States,[2] and confirmed by the Convention of 1838 between the United States and the Republic of Texas;[3] and it became part of the boundary between the State of Texas and the adjacent territory of the United States on the ad-

[1] 8 Stat. 252.

[2] 8 Stat. 372.

[3] Treaties and Conventions of the United States, 1079.

mission of Texas into the Union in 1845.[4] In 1850, however, by a legislative compact between the United States and the State of Texas, it was agreed that the northern boundary line of Texas should run west with the parallel of 36 degrees 30 minutes from its intersection with the 100th meridian;[5] so that we are not now concerned with the portion of the meridian extending north of that parallel.

Since 1850 many steps have been taken—at long intervals—looking to the establishment of the line of the meridian between the Red River and the parallel. To rightly understand the course of the legislation it should be borne in mind: first, that the Red River forks about sixty miles east of the strip of land now in dispute, the South Fork passing along its southern end, and the North Fork crossing it about forty miles to the north; and, secondly, that on Melish's map of the United States the 100th meridian was erroneously shown as crossing the Red River more than one hundred miles east of this strip, and east of the fork in the River.[6] These two facts gave rise to a controversy in reference to the location of the other boundary line along the course of the Red River, which, although now long determined, was interwoven with the question as to the location of the line of the meridian north of the River and complicated the issues involved in its settlement.

In the light of this preliminary statement we proceed to set forth, in chronological order, the material facts[7] necessary to the determination of the contentions now made.

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[4] Joint Res., 5 Stat. 797; Joint Res., 9 Stat. 108.

[5] 9 Stat. 446, c. 49; 2 Sayles' Early Laws of Texas, 267; President's Proclamation, 9 Stat. 1005.

[6] See copy of Melish's map, 162 U. S. 1, 52; also House Report No. 1595, 58th Cong., 2d sess., p. 2.

[7] These are shown, in the main, by an agreed statement of facts.

The first step towards the location of the boundary line was taken by the Texas Legislature, which in 1854 authorized the appointment of a commissioner, who, with a commissioner for the United States, should run and mark the entire boundary line between Texas and the territories of the United States from the point where it left the Red River to its intersection with the Rio Grande.[8]

Pending action by Congress in this matter, the United States, by a treaty made with the Choctaw and Chickasaw Indians in 1855,[9] awarded them a tract of land in the Indian territory whose western boundary was described as running north from the Red River along the 100th meridian to the main Canadian River. In 1857, the Commissioner of Indian Affairs, for the purpose of marking the boundaries of the Indian lands, employed two contract surveyors, A. H. Jones and H. M. C. Brown, to survey and mark the line of the meridian from the north bank of the main Red River to the north boundary of the Creek or Seminole country.

Before Jones and Brown had commenced this survey, Congress, in 1858, authorized the appointment of a joint commissioner to run and mark the boundary line between the Territories of the United States and Texas in accordance with the Texas Act of 1854.[10] The commissioners began their work on the Rio Grande, but differences soon arose, which caused them to separate; and the survey was continued solely by John H. Clark, the United States commissioner, who ran and marked a large part of the western boundary of Texas and its northern boundary along the parallel.[11]

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[8] 3 Gammel's Laws of the State of Texas, 1525. And see prior Joint Resolution to the same effect, *Ib.*, 206.

[9] 11 Stat. 611.

[10] 11 Stat. 310, c. 92.

[11] Clark's reports appear in Sen. Ex. Doc. No. 70, 47th Cong., 1st sess.; and a summary in House Doc. No. 635, 57th Cong., 1st sess., p. 14.

Meanwhile Jones and Brown had made, in 1859, their survey of the boundary of the Indian lands. They began at a rock monument on the north bank of the South Fork of Red River, placed to mark the intersection of the 100th meridian with that stream, and ran the line of the meridian northwardly from this monument about 109 miles, marking it with mile posts.[12]

In February, 1860, the Texas Legislature—then claiming, it appears, that the boundary line along the Red River followed the line of the North Fork—created the County of Greer, with a boundary including, in general terms, all the territory lying east of the 100th meridian and between the North and South Forks of the River; this being a tract containing more than 2,000 square miles and extending about sixty miles east of the Jones and Brown line.[13]

Later in 1860, Clark, the United States commissioner, under instructions from the Secretary of the Interior, adopted and retraced so much of the line of the meridian as had been established by Jones and Brown, and prolonged their line to its intersection with the parallel, where he established an earth monument to mark the northeast corner of Texas.[14]

For many years after 1860 Texas asserted complete jurisdiction over the territory included in Greer County.[15]

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[12] See report of Commissioner of the General Land Office, House Report No. 1282, 47th Cong., 1st sess.; and House Doc. No. 635, 57th Cong., 1st sess., p. 12. It appears that Jones and Brown adopted as the beginning of their survey the monument which had been erected earlier in the same year by Daniel G. Major, the astronomer for Indian boundary surveys.

[13] 2 Sayles' Early Laws of Texas, 490. This meridian was described in the Act as "the twenty-third degree of west longitude," this being the longitude from Washington. The tract is that marked on a map in 162 U. S. 1, 22, as "Unassigned Land."

[14] See Clark's report, Sen. Ex. Doc. No. 70, 47th Cong., 1st sess., p. 300.

[15] See House Report No. 1595, 58th Cong., 2d sess., p. 3.

At different times from 1872 to 1875, four United States contract surveyors separately retraced different portions of the Jones, Brown, and Clark line of the 100th meridian and re-established most of it by rebuilding many of the mile posts. They also, at the same times, subdivided the public lands in the western part of the Indian Territory in a series of townships closing on the west upon the line thus retraced and re-established, on which they erected the closing corners of the townships.[16]

In 1876 the Texas Legislature established a series of five new counties lying west of the Jones, Brown and Clark line and extending southwardly from the parallel beyond the South Fork of Red River. Their eastern line commenced "at a monument on the intersection of the one hundredth meridian" and the parallel, and called for five "mile posts on the one hundredth meridian" and "the initial monument on the one hundredth meridian." One of these counties and parts of two others lay between the North and South Forks of Red River, and two of these "mile posts" and the "initial monument" were between the two Forks, that is, between these counties and Greer County.[17]

In 1879 Congress passed an Act creating the northern judicial district of the State of Texas, in which Greer County was included.[18]

In January, 1882, the Secretary of the Interior, in response to a Resolution of the Senate calling for a report of any survey made by the United States and Texas Boundary Commission under the Act of 1858, trans-

[16] See report of Arthur D. Kidder, special examiner of surveys, House Report No. 1186, 59th Cong., 1st sess., p. 8, and the Field Notes and Plats of the Indian Territory to which he refers; *Id.*, 45 Cong. Rec. 6109.

[17] Sayles' Early Laws of Texas, 505. The lines of these counties are given in 162 U. S. 1, 40, note 1, and their location is shown on the map at p. 22.

[18] 20 Stat. 318, c. 97.

mitted a report of the Commissioner of the General Land Office in which, after setting forth the work that had been separately done by Clark in running the western and northern boundaries of Texas, the establishment of part of the line of the 100th meridian by Jones and Brown, and the retracing of their line by Clark, he specifically called attention to the fact that: "No part of said boundary survey has ever been officially agreed upon or accepted by the two governments as contemplated in the Act of Congress authorizing the survey." This report was referred to the Senate Committee on Territories.[19]

At this same session of Congress—a controversy having meanwhile arisen as to the ownership of the territory included in Greer County—a Representative from Texas introduced a bill to define the boundary between the Indian Territory and Texas as running up the middle of the North Fork of the Red River to the 100th meridian, and thence due north to "the northeast corner of said State of Texas as now established;"[20] while a Senator from Texas introduced a bill to create a joint commission to run and mark the boundary line along the course of the Red River westwardly to the 100th meridian, as laid down in Melish's map, and definitely settle which Fork was the principal or true Red River.[21] And before the

[19] Sen. Ex. Doc. No. 70, 47th Cong., 1st sess. Many years later, in 1906, the House Committee on the Judiciary again called attention to the fact that up to the date of this report of the Secretary of the Interior no part of the boundary "had ever been officially agreed upon or accepted by Texas or the United States, as contemplated in the Act" of 1858. House Report No. 1186, 59th Cong., 1st sess., p. 3.

[20] H. R. 1715, 47th Cong., 1st sess. This bill was reported upon adversely by the House Judiciary Committee, which recommended the creation of a joint commission to settle the facts involved in the Greer County controversy. House Report No. 1282, 47th Cong., 1st sess. This report appears in 162 U. S. 1, 69, note 1.

[21] S. 954, 47th Cong., 1st sess. This bill passed the Senate. 13 Cong. Rec. 3027.

end of this session, the legislature of Texas, in May, 1882, passed an Act authorizing the appointment of a commissioner to run and mark, with a commissioner for the United States, the course of the Red River westwardly to the 100th degree of west longitude, as laid down on Melish's map, in order to settle the true location of the meridian and determine whether the North or South Fork was the true Red River designated in the treaty of 1819; and to establish a monument where the meridian crossed the River as a corner in the boundary.[22]

Congress took no final action in reference to any part of the boundary line at this session. In 1885, however, it passed an Act, reciting that a controversy existed between the United States and Texas as to the point where the 100th degree of longitude crossed the River, as described in the treaty, which had never been ascertained and fixed by any authority competent to bind the United States and Texas, and which should be settled so that the boundary then in dispute because of the difference of opinion as to this crossing might also be settled; and authorizing the President to designate officers who, in conjunction with such persons as might be appointed by Texas, should ascertain and mark the point where the 100th meridian crossed the Red River, in accordance with the terms of the treaty.[23]

In 1887 the President issued a proclamation reciting that the United States owned all of the territory lying between the 100th meridian and the North and South Forks of the Red River, but that the State of Texas had asserted a conflicting claim thereto growing out of a controversy as to the point where the meridian crossed the Red River, as described in the treaty of 1819, and that the United States commissioners appointed under the Act of 1885 had by their report determined that the

[22] 9 Gammel's Laws of the State of Texas, 265.

[23] 23 Stat. 296, c. 47.

South Fork was the true Red River designated in the treaty, but the Texas commissioners had refused to concur in this report; and admonishing and warning the officers of Greer County and all other persons against exercising or attempting to exercise any authority over these lands.[24]

In 1890 Congress created the Territory of Oklahoma out of a portion of the Indian Territory bounded on the west and south by the boundary lines of the State of Texas;[25] and by the same Act directed that a suit in equity be brought in this Court on behalf of the United States against the State of Texas, to settle the controversy as to the title to the land included in Greer County lying east of the 100th meridian, and between the Forks of the Red River. The suit was instituted in the same year.

In 1891 the surveys made by Clark, the United States commissioner, under the Act of 1858, of the western and northern boundary lines of Texas, were "confirmed" by an Act of Congress[26] and by a Joint Resolution of the Texas Legislature;[27] but neither the Act nor the Resolution made any reference to the survey of the eastern boundary.

In 1892 H. S. Pritchett, Director of the Astronomical Observatory of Washington University, St. Louis, was employed by Texas to establish, scientifically and accurately, the intersection of the 100th meridian with the Red River. He located this intersection 3797.3 feet east of the Jones and Brown initial monument.[28]

In 1896 this Court decided the *Greer County* case, and entered a decree adjudging that the territory east of the

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[24] 23 Stat. 843. The report of the United States commissioners appears in House Ex. Doc. No. 21, 50th Cong., 1st sess.

[25] 26 Stat. 81, 92, c. 182.

[26] 26 Stat. 948, 971, c. 542.

[27] 10 Gammel's Laws of the State of Texas, 195.

[28] His report appears in House Doc. No. 635 57th Cong., 1st sess., p. 31.

100th meridian of longitude between the North Fork of the Red River and the south bank of the South Fork, called Greer County, constituted no part of the territory belonging to Texas, but was subject to the exclusive jurisdiction of the United States. *United States* v. *Texas, supra,* 90.

In 1901 Congress passed a Act, in which, after reciting that this Court had adjudged in the *Greer County* case that "the degree of longitude one hundred west" designated in the treaty of 1819, "referred to the true one hundredth meridian astronomically located," and that "the true intersection of this meridian" with the South Fork of Red River had not been fixed by the United States and Texas, acting together, nor "by the decree in said cause," the Secretary of the Interior was directed to cause "the intersection of the true one hundredth meridian" with the South Fork of the River, to be established and fixed "by the most accurate and scientific methods," and a suitable monument to be erected at such intersection.[29]

Pursuant to this Act the Secretary of the Interior detailed Arthur D. Kidder, Examiner of Surveys, to establish the point of intersection of the true meridian with the River. He did this work in 1902, making his observations and calculations according to the scientific methods then in use; determined that the true meridian intersected the South Fork at a point 3699.7 feet east of the initial monument of Jones and Brown, and 97.6 feet west of Pritchett's location; and placed a sandstone monument on the north side of the stream to mark the point of intersection as thus determined. His report and field notes were approved by the Commissioner of the General Land Office and adopted by the Secretary of the Interior, who transmitted copies of them to the House of Representatives, and reported, in accordance therewith, that he had caused "the intersection of the true one

[29] 31 Stat. 731, c. 75.

hundredth meridian with the Red River" to be determined and established by a permanent monument in compliance with the Act of 1901.[30]

In March, 1903, Kidder, who meanwhile had been further detailed by the Secretary of the Interior, as astronomer and surveyor, to establish and mark upon the ground the point of intersection of the 100th meridian with the parallel of 36 degrees 30 minutes, and three other astronomical points in the boundary of Texas, was directed by the Commissioner of the General Land Office to establish these standard reference points, and also to " ascertain the condition of the old boundary lines, the amount of error in the original surveys and . . . the changes which a true determination would involve," and specifically, to " make a careful retracement of the 100th meridian as closed upon in the survey of public lands in Oklahoma from the Red River north to the parallel."

Before Kidder had completed this supplemental work, the Texas Legislature in April, 1903, authorized the appointment of a commissioner to run and mark with a commissioner for the United States, the boundary lines between Texas and the Territories of Oklahoma and New Mexico.[31] This Act recited that Kidder had duly fixed a monument at the intersection of the true 100th meridian with the Red River, as provided by the Act of Congress of 1901, which properly marked the boundary, and required a re-survey of the lines between Texas and Oklahoma; and directed that the monument established by Kidder as the point of intersection should " be accepted as correct."

Kidder completed his supplemental work on the boundary line in 1903, and made a detailed report to the Secretary of the Interior in April, 1904, which was trans-

[30] House Doc. No. 33, 57th Cong., 2d sess.; *Id.*, 45 Cong. Rec. 6105. Field notes, House Doc. No. 375, 57th Cong., 2d sess.

[31] Texas General Laws, 1st Call. Sess., 1903, p. 12.

mitted to the House of Representatives in December, 1905.[32] The portion of this report dealing with the 100th meridian shows that he retraced the entire Jones, Brown, and Clark line, as it had been re-established and closed upon by the various contract surveyors between 1872 and 1875, and found that, beginning at the initial monument of Jones and Brown on the bank of the South Fork of Red River, it deflected gradually to the east, and intersected the line of the parallel 743.16 feet west of the line of the 100th meridian extended north through the monument which he had previously placed on the South Fork. He found no evidence of the monument established by Clark in 1860 to mark this intersection. At the easterly point which Kidder determined to be the intersection of the parallel and the true meridian he placed a concrete and iron monument, but he did not mark the intervening line of the meridian. He also found that since the execution of the surveys closing upon the Jones, Brown and Clark line, the United States had patented and disposed of public lands on the east, and that Texas had apparently closed its surveys on the same line for a large part of the distance.

In December, 1904, the Secretary of the Interior transmitted to the House of Representatives, the draft of a bill submitted by the Commissioner of the General Land Office to provide for the re-survey and re-establishment of portions of the boundary lines between Texas and the Territories of New Mexico and Oklahoma, including the line of the 100th meridian from the Red River to the parallel of 36 degrees 30 minutes. This was accompanied by a letter from the Commissioner, in which he stated that large errors had been discovered in the location of the 100th and 103rd meridians, and that the agitation concerning questions of jurisdiction which had been prolific

[32] House Doc. No. 259, 59th Cong., 1st sess., with diagram; *Id.*, House Report No. 1186, 59th Cong., 1st sess., and 45th Cong. Rec. 6108

on account of these incorrect locations, could only be ended by the establishment of lines upon the ground in the locations where they were designed to be when these meridians were named as the boundaries of Texas. These were referred to the House Committee on Public Lands.[33]

In 1905 and 1906 a Representative from Texas introduced in the House of Representatives two bills and a joint resolution to provide for the running and marking of the boundary line between Texas and the Territories of the United States, in substantially the same terms as the Texas Act of 1903; except that, while accepting as correct Kidder's location of the intersection of the true 100th meridian with the Red River, they directed that the line be run north to the intersection of the meridian with the parallel of 36 degrees 30 minutes as determined by Clark, the United States commissioner, in 1859.[34] These bills were recommended for passage by the House Committees on the Judiciary and on Indian Affairs, respectively, but no further action was had in reference to them.[35]

Again, in October, 1907, the Secretary of the Interior wrote a letter to the House of Representatives recommending the adoption of a Joint Resolution, a draft of which he enclosed, for the appointment of commissioners to establish the boundary between Texas and the Territories of the United States, substantially in accordance with the Texas Act of 1903, and likewise providing that the monument established by Kidder as the point of intersection of the true 100th meridian should "be accepted as correct." In this letter, after calling attention to the fact that no action had been taken by Congress in this matter, he said: "The adjustment of these lines is of

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[33] House Doc. No. 38, 58th Cong., 3d sess.

[34] Bill, H. R. 443, 59th Cong., 1st sess.; House Joint Res. No. 66, 59th Cong., 1st sess.; Bill, H. R. 15098, 59th Cong., 1st sess.

[35] House Report No. 1186, 59th Cong., 1st sess.; House Report No. 1788, 59th Cong., 1st sess.

great interest to the department, because they involve both public lands and lands of the Choctaw Indians, and until they are adjusted present problems and embarrassments which cannot be solved or removed until the lines are definitely fixed and marked. The continued unsettled condition of these boundary lines adds to the problems and involves the Government, settlers on the public lands, and citizens of the Indian tribes and of the State of Texas in trouble and expense . . . of which they should be relieved at the earliest possible moment." This letter and resolution was referred to the House Judiciary Committee.[36]

In November, 1907, Oklahoma was admitted as a State of the Union.[37]

In 1910 the House Committee on Indian Affairs recommended for passage another Joint Resolution introduced by the Representative from Texas for the creation of a commission to establish and mark the boundary lines between Texas and the Territories of the United States, corresponding to the Joint Resolution which had been recommended by the Secretary of the Interior in 1907,[38] but no further action was taken by Congress in reference to the matter.

In 1910 also, one John L. Wortham filed applications with the surveyors of the five counties that had been created in 1876, under the provisions of the Texas Acts authorizing the sale of vacant land, for the purchase from the State of the land on the east of these counties lying in the strip now in dispute, between the Jones, Brown and Clark line and Kidder's location of the 100th meridian, which had not been previously embraced in the land surveys of these counties. One of these surveyors

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[36] House Doc. No. 54, 60th Cong., 1st sess.

[37] President's Proclamation, 35 Stat. 2160.

[38] House Joint Res. No. 6, 61st Cong., 2d sess.; House Report No. 1250, 61st Cong., 2d sess.

having refused to make a survey for the purpose of obtaining a grant, it was held by the Texas Court of Civil Appeals, in 1912, that mandamus would not lie to compel him so to do, on the ground, substantially, that as the undisputed facts show that the State of Texas was not exercising jurisdiction over this land, it was not the duty of the county surveyor to survey lands which the political powers of the State recognized as lying beyond its limits, and the court had no jurisdiction to determine whether the *de facto* boundary line was the *de jure* boundary of the State, this being a political and not a judicial question. *Wortham* v. *Sullivan,* 147 S. W. 702. On the other hand, however, surveys having been made by other county surveyors and the applications returned to the General Land Office of Texas, three patents were issued to Wortham by the State of Texas later in the same year covering 2002 acres of the strip of land in dispute; this being the only part of this strip which Texas has ever attempted to patent. Since that time, it is stipulated, the award to Wortham of other lands in this strip has been held in abeyance "on account of the shadow of doubt cast upon the legal status of the aforesaid Kidder line," but "the General Land Office of Texas has in no sense abandoned its claim to the area west of and adjacent to" that line.

In 1919 the Texas Legislature passed an Act reciting the existence of a controversy between Texas and Oklahoma, and possibly the United States and certain Indian tribes, concerning the boundaries between the two States, and directed that a suit be instituted in this Court for the purpose of determining and settling these boundaries.[39] But before this suit had been commenced the State of Oklahoma brought its suit in the present cause, in which, as has been stated, the State of Texas set up by counter-

[39] Concurrent Resolution, 2d Call. Sess., General Laws of Texas, 1919, p. 462.

claim its contention in respect to the location of the 100th meridian.

In 1923 the United States Coast and Geodetic Survey undertook to locate the portion of the 100th meridian in controversy by a modern and scientific method of triangulation, and concluded that the true meridian ran 371.5 feet east of the Kidder monument.

In addition to the foregoing matters the parties have stipulated that " the United States, the Territory of Oklahoma and the State of Oklahoma in succession have continuously enforced their laws, civil and criminal over the strip here in dispute ever since the decision in the Greer County Case."

It further appears that prior to May 3, 1920, the United States had disposed of 20,657 acres in the strip in dispute by patents issued on homestead entries and public sales, for which it had collected $8,026; that 3118 acres had been included in the school and university grants to Oklahoma; and that there were then 318 acres in pending entries, leaving, it was estimated, 118 acres of vacant land. The dates of these patents and grants are not shown.

We come now to the consideration of the several contentions made by the parties.

In the first place it is to be observed that while the intersection of the line of the 100th meridian and the South Fork of Red River has been located four times, that is, by Jones and Brown in 1859, by Pritchett in 1892, by Kidder in 1902, and by the Coast and Geodetic Survey in 1923—the three latter locations differing between themselves by less than 400 feet—there is no extrinsic evidence showing that any one of these locations is precisely correct. Nor is this claimed. And we have now no occasion to settle the exact location of the meridian line, as an original matter; the present contentions, as stated at the outset, being, on the one side, that the Jones, Brown and Clark line is conclusively established as the boundary by

the decision and decree in the *Greer County* case, and, also, independently of that adjudication, by long continued recognition, acquiescence, and the exercise of jurisdiction, and on the other side, that a line running north from the Kidder monument is the established boundary. We take up these contentions in their order.

1. The *Greer County* suit was brought by the United States against Texas solely to settle the controversy as to the land in " Greer County " lying east of the 100th meridian and between the Forks of the Red River. It did not involve any part of the boundary north of the River. Nor did it involve, under the issues submitted, the precise location of the meridian between the two Forks, but merely the general questions whether under the treaty of 1819 the boundary line along the course of the Red River followed the North or South Fork, or either of them, to the true meridian.

On the hearing, as appears from the opinion, the United States contended that under the treaty of 1819 the boundary line following the course of the Red River westward to the 100th meridian, went along and up the South Fork, as the continuation or principal fork c the River (p. 34). Texas, on the other hand, contended: 1st, that as the treaty declared that the boundary line should be as laid down on Melish's map, which located the 100th meridian east of the forks, thereby throwing the entire area in dispute west of the meridian, it was immaterial whether this location of the meridian on the map, being conclusive upon both governments, was astronomically correct or not, or whether the one or the other fork was the continuation of the main river; and 2nd, in the alternative, that even if the treaty referred to the true meridian, the course of the River followed the North Fork, and not the South (pp. 34, 35).

The court first concluded that, upon a reasonable interpretation of its provisions, the treaty merely took

Melish's map as the general basis for the adjustment of the boundaries, and left open to subsequent determination and exact designation the precise location of the true 100th meridian (pp. 38, 42). Independently, however, of this interpretation of the treaty, it was added, as being, perhaps, a stronger view, and equally conclusive, that the official acts of the general government and of Texas required that the controversy should be determined upon the basis that the treaty line was intended to extend to the true or actual meridian, and not to stop at the Melish location (pp. 38, 42). In developing this view the court, after concluding and emphasizing that the legislative compact of 1850 between the United States and Texas accepted the true 100th meridian as the boundary line, and discarded the Melish location, said further that the precise location of the meridian had not been left in doubt by the two governments; that the United States had erected a monument at the point where it intersected the parallel of 36 degrees 30 minutes, and Texas had by its legislation often recognized the true meridian to be as located by the United States; that the two governments had, by official action, declared that the meridian was located on the line marking the eastern boundary of four of the counties established by Texas in 1876; that the proof left no room to doubt that the true meridian was "immediately east of those counties"; and that the acts of the two governments and the evidence, therefore, concurred in showing that the meridian was "not correctly delineated on the Melish map" (pp. 39–41). The final conclusion on this question was that, independently of the treaty itself, it must be held that the legislative compact of 1850, together with the subsequent acts of the two governments, required that the meridian "be taken to be the true 100th meridian," and, consequently, that the course of the Red River westward "must go, and was intended to go to the true or actual 100th meridian, and not stop at the Melish 100th

meridian." (p. 42.) Taking up then the remaining question whether, as the United States contended, the line following the course of the Red River westward met the 100th meridian at the point where the South Fork of the River crossed the meridian, or whether, as Texas contended, it ran up the North Fork northwestwardly until it crossed the meridian, the court, after a detailed consideration of the evidence, concluded that the South Fork more nearly met the requirements of the treaty, and was to be followed as the boundary line to its intersection with the true meridian (pp. 42, *et seq.*) There was, however, no statement in the opinion either that this point of intersection was fixed at the Jones and Brown initial monument, or that Jones, Brown and Clark had correctly located the line of the meridian.

For the reasons stated in the opinion, the court entered a decree—set out at the end of the opinion itself—by which it was "ordered, adjudged and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the North Fork of Red River, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red River and of the river now known as the Prairie Dog Town Fork or South Fork of Red River until such line meets the 100th meridian of longitude—which territory is sometimes called Greer County—constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America." (p. 90.)

We are of opinion that the decision in that case is not conclusive upon the parties as an adjudication that the boundary line between Texas and the Territories of the

United States followed the line of the 100th meridian as surveyed and marked by Jones, Brown and Clark. The sole questions, under the issues submitted, were whether the erroneous location of the meridian on Melish's map was controlling, and, if not, whether the boundary line followed the North or South Fork to the intersection with the true meridian. No issue was submitted as to whether, if the South Fork were to be followed, the Jones, Brown and Clark line was to be taken as establishing the exact location of the true meridian and fixing the western boundary of the tract in dispute. And while it was said in the opinion, *arguendo*, in disposing of the first issue, that Texas had recognized the true meridian to be as located by the United States, and the two governments had declared, by official action, that it was located on the line marking the eastern boundary of four of the counties established by Texas in 1876, the proof leaving no doubt that the true meridian was immediately east of these counties—this was said, not as a determination of the exact location of the true meridian for the purpose of a precise adjudication, but merely as one of the reasons leading to the general conclusion that under the treaty of 1819 the boundary was intended to follow, as the parties had recognized, the line of the true meridian and not the location laid down on Melish's map. This is emphasized and made clear by the terms of the decree, which merely adjudged, in general terms, that the land lying east of the meridian and between the two forks was not the property of Texas, but within the exclusive jurisdiction of the United States; and neither adjudged that the true meridian followed the Jones, Brown and Clark line nor otherwise fixed its precise location.

The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended

to be submitted, and which it was intended to decide. *Vicksburg* v. *Henson,* 231 U. S. 259, 272, 273; *United Shoe Mach. Co.* v. *United States,* 258 U. S. 451, 460.

Thus tested, the effect of the decree in so far as it related to the western boundary of the tract in dispute, was merely that it followed the line of the true meridian. In other words, the location of the boundary along the true meridian was left in the same situation under the decree as that of the south bank of Red River and of the South Fork. Each was declared in general terms to be the boundary; but the precise location of neither was adjudged. It was later held by this Court that, while so much of this decree as adjudged that the boundary between the territories of the United States and Texas followed the south bank of Red River and of the South Fork was *res judicata* and conclusive upon the parties, *Oklahoma* v. *Texas,* 256 U. S. 70, 93, it still needed to be determined what constituted the south bank of the river and where along that bank the true boundary line was to be located. *Oklahoma* v. *Texas,* 256 U. S. 602, 608. And so, while the decree likewise conclusively determined that the boundary line between Texas and the territories of the United States followed the line of the true 100th meridian from its intersection with the South Fork of Red River, it was, for like reason, not an adjudication as to the precise location of the meridian line, but left this matter open and undetermined.

This was clearly recognized by the Act of Congress of 1901, which recited, not only that it had been adjudged by this Court that the treaty of 1819 "referred to the true one hundredth meridian astronomically located," but that "the true intersection of this meridian" with the South Fork of Red River had not been fixed either by the United States and Texas, acting together, or by the decree; and directed the Secretary of the Interior to cause the "intersection of the true meridian" with the

South Fork to be established. And the recognition of the fact that the precise location of the boundary line along the meridian had not been definitely determined nor settled, was the basis not only of the subsequent recommendations of the Secretary of the Interior for the settlement of the boundary, but of the reports of the House committees recommending legislation for running and marking the line.

2. The contentions that the Jones, Brown and Clark line has been recognized and adopted as the location of the 100th meridian for a long course of years and is established as the boundary by acquiescence and the exercise of jurisdiction, are made by Oklahoma alone, and not by the United States.

It is well settled that governments, as well as private persons, are bound by the practical line that has been recognized and adopted as their boundary, *Missouri* v. *Iowa,* 7 How. 660, 670; *New Mexico* v. *Colorado,* 267 U. S. 30, 40; and that a boundary line between two governments which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by them for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the correct course; the line so established taking effect, in such case, as a definition of the true and ancient boundary. *Virginia* v. *Tennessee,* 148 U. S. 503, 522; *Maryland* v. *West Virginia,* 217 U. S. 1, 42; *New Mexico* v. *Colorado, supra,* 40. We find, however, upon the facts, that the Jones, Brown and Clark line has not been established as the boundary line by any such long continued recognition and acquiescence.

The original Jones and Brown line was not run for the purpose of marking the boundary between Texas and the Territories of the United States under any authority from Congress, but was located under the direction of the Commissioner of Indian Affairs merely to mark the

boundary of certain Indian lands. The retracement and re-establishment of this line, as it had been extended by Clark in 1860, and the subdivision of the public lands into townships closing on it, between 1872 and 1875, was merely the action of the Land Department. Congress itself did not in any manner recognize this line as constituting the boundary of Texas.

And although the Texas Legislature in 1876 established five new counties in which the calls for monuments and mile posts on "the one-hundredth meridian" evidently referred to the Jones, Brown and Clark line, it is apparent that these calls were inserted merely as a description of the boundaries of the new counties and not as a recognition of this line as constituting the eastern boundary of the State itself, since one of these monuments and two of these mile posts were within the forks of the Red River and between three of these new counties and "Greer County," which the Legislature had created sixteen years before, and over which Texas was continuing to assert jurisdiction. In 1882, the report of the Secretary of the Interior called attention to the fact that no part of the boundary survey had ever been officially agreed upon or accepted by the two governments as contemplated by the Act of Congress. In the same year the Texas Legislature asserted that it was necessary to run and mark the course of the Red River to the 100th meridian, as laid down on Melish's map, in order to settle the true location of the meridian and determine whether the north or south fork was the true Red River, and that a monument should be established where the meridian crossed the River as a corner in the boundary. In 1885 Congress declared that the point where the 100th meridian crossed the River, as described in the treaty, had never been ascertained and fixed by any authority competent to bind the United States and Texas, and that the existing controversy and the boundary then in dispute because of a difference of

opinion as to this crossing should be settled. In 1891, although the surveys made by Clark, under the Act of 1858, of the western and northern boundary lines of Texas, were "confirmed" both by Congress and by the Texas Legislature, neither confirmed his survey of the eastern boundary line. In 1892 Texas separately employed Pritchett to establish the intersection of the meridian with the River. In 1901, after it had been settled by the decision in the *Greer County* case that the boundary line followed the South Fork of the River to its intersection with the true meridian, Congress declared that the true intersection of this meridian with the South Fork had not been fixed and directed that it be established and a monument erected. This was done by Kidder in 1902, and reported by the Secretary of the Interior as a determination and establishment of the true intersection. The Texas Legislature in 1903 declared that Kidder had duly fixed the intersection of the true meridian with the River, and that his monument properly marked the boundary and should be "accepted as correct." And from that time to the filing of its counterclaim in 1920 Texas never abandoned this contention, or recognized in any manner the Jones, Brown and Clark line as the boundary; while, on the other hand, the Secretary of the Interior not only approved Kidder's location of the true intersection, but in 1907 recommended that it be "accepted as correct" in establishing the boundary. And finally, in 1919, the Texas Legislature specifically asserted the existence of a controversy concerning the boundary line.

These facts, in our opinion, demonstrate that from the running of the Jones, Brown and Clark line in 1859 and 1860 to the filing of the counterclaim by Texas in 1920, there was no period of time, either before or after the decision in the *Greer County* case, in which Texas and the United States or the State of Oklahoma, recognized and aquiesced in the Jones, Brown and Clark line as the estab-

lished boundary, and fall far short of showing its practical adoption. On the contrary, the course of the legislation, on both sides, instead of treating the boundary as settled and acquiesced in, dealt with it as a matter requiring settlement. *Arkansas* v. *Tennessee,* 246 U. S. 158, 172.

Nor is the fact, as to which the parties have stipulated, that since the decision in the *Greer County* case the United States, and the Territory and State of Oklahoma in succession have continuously enforced their civil and criminal laws over the territory in dispute, sufficient to establish Oklahoma's claim to this territory by prescription. The general principle of public law that as between states long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of the rightful authority, *Rhode Island* v. *Massachusetts,* 4 How. 591, 638, *Indiana* v. *Kentucky,* 136 U. S. 479, 510, *Virginia* v. *Tennessee, supra,* 522, *Louisiana* v. *Mississippi,* 202 U. S. 1, 53, *Maryland* v. *West Virginia,* 217 U. S. 1, 42—a principle by which prescription founded on length of time is regarded as establishing an incontestible right—does not apply here.

Without determining whether the period of twenty-four years which intervened between the decision in the *Greer County* case and the filing of the counterclaim, could under any circumstances be a sufficient foundation for a prescriptive right—this being a much shorter period than that involved in any of the cases cited—it suffices to say that even during this period there has been neither a continuous assertion of a claim of right on the one side, nor an acquiescence therein upon the other. Within five years after this decision, while the United States still had paramount jurisdiction as to the boundaries of the Territory of Oklahoma, Congress specifically declared that the true intersection of the meridian with the South Fork of the River, which had been adjudicated as a corner in the

boundary between Texas and the Territory, had not as yet been fixed—thereby disavowing the Jones and Brown initial monument as an established corner—and directed that the true intersection be established. Thereafter, Kidder having established this intersection, with the approval of the Secretary of the Interior, at a point about three-quarters of a mile east of the Jones and Brown monument, the Texas Legislature immediately asserted and has continued to assert that his monument correctly located the true intersection and properly marked the boundary. And, on the other hand, although Congress did not accept the Kidder monument as correct, it did not at any time assert any claim that the jurisdiction of the United States extended to the Jones, Brown and Clark line.

It is plain that, under these circumstances, essential elements necessary to the establishment of a prescriptive right by an exercise of jurisdiction acquiesced in for a long period of years, are lacking.

3. On the other hand we cannot sustain the contention made by Texas that a line running north from the Kidder monument is the recognized and established boundary. The Act of Congress of 1901, while recognizing, in effect, that the true intersection of the meridian with the South Fork of the River is a corner in the boundary, merely directed that this point be established and marked by a monument, and did not authorize the establishment of the boundary line running northwardly from this monument. Thereafter, despite the facts that Kidder's monument was approved by the Secretary of the Interior and reported by him as a determination of the true intersection; that the Texas Legislature accepted Kidder's monument as properly marking the boundary; that the Secretary of the Interior caused Kidder to ascertain and mark the point where the line of the meridian intersected the parallel of 36 degrees 30 minutes, and show the discrepancy

between the meridian and the Jones, Brown and Clark line; that the Secretary submitted drafts of two bills for the running and marking of the boundary line, one of which specifically provided that Kidder's monument should be accepted as correct; and that various other bills and resolutions were from time to time introduced in the House of Representatives for the same purpose, some of which were recommended for passage by the committees to which they were referred—Congress nevertheless took no further action as to this matter, and neither accepted Kidder's monument as the correct location of the intersection of the true meridian and the South Fork, nor provided for the establishment and marking of the boundary northwardly therefrom. It is entirely clear that under these circumstances the line running north from the Kidder monument—which has never been run or marked upon the ground—cannot be regarded as the established boundary acquiesced in and adopted by the parties.

4. On the entire case our conclusions therefore are: that neither the Jones, Brown and Clark line, nor a line running north from the Kidder monument has been established as the boundary line; that the boundary is the line of the true 100th meridian extending north from its intersection with the south bank of the South Fork of Red River to its intersection with the parallel of 36 degrees, 30 minutes; and that this line should now be accurately located and marked by a commissioner or commissioners appointed by the court, whose report shall be subject to its approval.

The parties may submit within thirty days the form of a decree to carry these conclusions into effect.

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INTERNATIONAL STEVEDORING COMPANY *v.* HAVERTY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 236. Argued October 5, 6, 1926.—Decided October 18, 1926.

Within the meaning of the Merchant Marine Act of June 5, 1920, which gives to seamen a right of action for damages, at law, for personal injuries, and, by adoption of statutes modifying or extending common law rights and remedies of railway employees, does away with the fellow servant doctrine in such cases, the term "seamen" is to be taken to include stevedores when engaged in the maritime work of stowing cargo. P. 51.

134 Wash. 235, affirmed.

CERTIORARI (269 U. S. 549) to a judgment of the Supreme Court of Washington which sustained a judgment against the petitioner, a stevedoring company, in an action at law brought by one of its employees for injuries sustained while stowing freight in a vessel.

Mr. Stephen V. Carey, with whom *Messrs. R. E. Bigham* and *Alfred J. Schweppe* were on the briefs, for petitioner.

Mr. Mark M. Lichtman, with whom *Mr. John F. Dore* was on the brief, for respondent.

Messrs. Arthur E. Griffin, George F. Vanderveer, and *Samuel B. Bassett* filed a brief as *amici curiae* by special leave of Court.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action brought in a State Court seeking a common law remedy for personal injuries sustained by the plaintiff, the respondent here, upon a vessel at dock

in the harbor of Seattle. The plaintiff was a longshoreman engaged in stowing freight in the hold. Through the negligence of the hatch tender, no warning was given that a load of freight was about to be lowered, and when the load came down the plaintiff was badly hurt. The plaintiff and the hatch tender both were employed by the defendant stevedore, the petitioner here, and the defendant asked for a ruling that they were fellow servants and that therefore the plaintiff could not recover. The Court ruled that if the failure of the hatch tender to give a signal was the proximate cause of the injury the verdict must be for the plaintiff. A verdict was found for him and a judgment on the verdict was affirmed by the Supreme Court of the State. 134 Wash. 235, 245. A writ of certiorari was granted by this Court. 269 U. S. 549.

The petitioner argues that the case is governed by the admiralty law; that the admiralty law has taken up the common law doctrine as to fellow servants, and that by the common law the plaintiff would have no case. Whether this last proposition is true we do not decide. The petitioner cites a number of decisions of which it is enough to mention *The Hoquiam*, 253 Fed. Rep. 627, and *Cassil* v. *United States Emergency Fleet Corporation*, 289 Fed. Rep. 774. It also refers to an intimation of this Court that, whether the established doctrine be good or bad, it is not open to courts to do away with it upon their personal notions of what is expedient. It is open to Congress, however, to change the rule, and in our opinion it has done so. By the Act of June 5, 1920, c. 250, § 20; 41 Stat. 988, 1007, "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." It is not disputed that the stat-

utes do away with the fellow servant rule in the case of personal injuries to railway employees. *Second Employers' Liability Cases,* 223 U. S. 1, 49. The question, therefore, is how far the Act of 1920 should be taken to extend.

It is true that for most purposes, as the word is commonly used, stevedores are not "seamen." But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the act, and that in this statute "seamen" is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind.

Judgment affirmed.

MYERS, ADMINISTRATRIX, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 2. Argued December 5, 1923; reargued April 13, 14, 1925.—Decided October 25, 1926.

1. A postmaster who was removed from office petitioned the President and the Senate committee on Post Offices for a hearing on any charges filed; protested to the Post Office Department; and

three months before his four year term expired, having pursued no other occupation and derived no compensation for other service in the interval, began suit in the Court of Claims for salary since removal. No notice of the removal, nor any nomination of a successor had been sent in the meantime to the Senate whereby his case could have been brought before that body; and the commencement of suit was within a month after the ending of its last session preceding the expiration of the four years. *Held* that the plaintiff was not guilty of laches. P. 107.

2. Section 6 of the Act of July 12, 1876, providing that "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law," is unconstitutional in its attempt to make the President's power of removal dependent upon consent of the Senate. Pp. 107, 176.
3. The President is empowered by the Constitution to remove any executive officer appointed by him by and with the advice and consent of the Senate, and this power is not subject in its exercise to the assent of the Senate nor can it be made so by an act of Congress. Pp. 119, 125.
4. The provision of Art. II, § 1, of the Constitution that "the Executive power shall be vested in a President," is a grant of the power and not merely a naming of a department of the government. Pp. 151, 163.
5. The provisions of Art. II, § 2, which blend action by the legislative branch, or by part of it, in the work of the Executive, are limitations upon this general grant of the Executive power which are to be strictly construed and not to be extended by implication. P. 164.
6. It is a canon of interpretation that real effect should be given to all the words of the Constitution. P. 151.
7. Removal of executive officials from office is an executive function; the power to remove, like the power to appoint, is part of "the Executive power,"—a conclusion which is confirmed by the obligation "to take care that the laws be faithfully executed." Pp. 161, 164.
8. The power of removal is an incident of the power to appoint; but such incident does not extend the Senate's power of checking appointments, to removals. Pp. 119, 121, 126, 161.
9. The excepting clause in § 2 of Art. II, providing, "but Congress may by law vest the appointment of such inferior officers

as they may think proper in the President alone, in the courts of law or in the heads of departments," does not enable Congress to regulate the removal of inferior officers appointed by the President by and with the advice and consent of the Senate. Pp. 158–161.

10. A contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of the Constitution were actively participating in public affairs, acquiesced in for many years, fixes the meaning of the provisions so construed. P. 175.

11. Upon an historical examination of the subject, the Court finds that the action of the First Congress, in 1789, touching the Bill to establish a Department of Foreign Affairs, was a clean-cut and deliberate construction of the Constitution as vesting in the President alone the power to remove officers, inferior as well as superior, appointed by him with the consent of the Senate; that this construction was acquiesced in by all branches of the Government for 73 years; and that subsequent attempts of Congress, through the Tenure of Office Act of March 2, 1867, and other acts of that period, to reverse the construction of 1789 by subjecting the President's power to remove executive officers appointed by him and confirmed by the Senate, to the control of the Senate, or lodge such power elsewhere in the Government, were not acquiesced in, but their validity was denied by the Executive whenever any real issue over it arose. Pp. 111, 164–176.

12. The weight of congressional legislation as supporting a particular construction of the Constitution by acquiescence, depends not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the government and the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere has been afforded. P. 170.

13. The provisions of the Act of May 15, 1820, for removal of the officers therein named "at pleasure," were not based on the assumption that without them the President would not have that power, but were inserted in acquiescence to the legislative decision of 1789. P. 146.

14. Approval by the President of acts of Congress containing provisions purporting to restrict the President's constitutional power of removing officers, *held* not proof of Executive acquiescence in such curtailment, where the approval was explicable by the value of the legislation in other respects—as where the restriction was in a rider imposed on an appropriation act. P. 170.

15. *Marbury* v. *Madison,* 1 Cranch 137, considered, in connection with *Parsons* v. *United States,* 167 U. S. 324, and *held* not authoritative on the question of removal power here involved. Pp. 139–144, 158.

The questions, (1) Whether a judge appointed by the President with the consent of the Senate under an act of Congress, not under authority of Art. III of the Constitution, can be removed by the President alone without the consent of the Senate; (2), whether the legislative decision of 1789 covers such a case; and (3), whether Congress may provide for his removal in some other way, present considerations different from those which apply in the removal of executive officers, and are not herein decided. Pp. 154–158.

This Court has recognized (*United States* v. *Perkins,* 116 U. S. 483) that Congress may prescribe incidental regulations controlling and restricting the heads of departments in the exercise of the power of removal; but it has never held, and could not reasonably hold, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers. P. 161.

Assuming the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it,—with the President, as part of the executive power, in accordance with the legislative decision of 1789. P. 161.

Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before, is a question not heretofore decided by this Court and not presented or decided in this case. P. 161.

Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent. P. 164.

58 Ct. Cls. 199, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for salary. Appellant's intestate, Frank S. Myers, was reappointed by the President, by and with the advice and consent of the Senate, as a postmaster of the first class. The Act of July, 1876, § 6, c. 179, 19 Stat. 80, provides that such postmasters shall hold office for four years, unless sooner removed or suspended according to law, and provides that they may be removed by the President "by and with the advice and consent of the Senate." Myers was removed, before the expiration of his term, by an order of the Postmaster General, sanctioned by the President. The removal was not referred to the Senate, either directly or through nomination of a successor, during the four year period. Judgment of the Court below that Myers could not claim salary for the part of that period following the removal, was based on the view that there had been laches in asserting the claim. The appeal was argued and submitted by counsel for the appellant, on December 5, 1924. On January 5, 1925, the Court restored the case for reargument. It invited the Honorable George Wharton Pepper, United States Senator from Pennsylvania, to participate as *amicus curiae*. The reargument occurred on April 13, 14, 1925.

In view of the great importance of the matter, the Reporter has deemed it advisable to print, in part, the oral arguments, in addition to summaries of the briefs.

Oral[1] argument of *Mr. Will R. King,* for appellant.

[1] NOTE.—This and the other oral arguments are perforce condensed in these reproductions, retaining, however, so far as practicable, the phraseology, as well as the substance. Senate Document No. 174 (69th Cong., 2d sess.), issued December 13, 1926 (Govt. Printing Office) contains not only the oral arguments as taken down by a stenographer (with no doubt some amendments of form), but also the record in the case, the briefs used on the reargument, and the opinions. The oral arguments of Senator Pepper and Solicitor General Beck were also printed (G. P. O.), in May, 1925, as a document of the Department of Justice.

In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time, so far as I am able to determine, a case in which the Government, through the Department of Justice, questions the constitutionality of its own act. As to that, I have no criticism to offer; I think it is but proper. We find the Solicitor General appearing as a representative of the Executive Department of the Government. And we have Senator Pepper, as *amicus curiae*, who, as I take it from his brief, represents another branch, the Legislative branch, of the Government. I appear as counsel for the appellant, who brought this suit in the first instance. It is gratifying to feel that all interests are properly represented.

Frank S. Myers, now deceased, and for whom the administratrix is substituted as a party, was postmaster at Portland, Oregon, for a number of years, four years the full term, and was then reappointed in 1917. About three years and a half after he entered upon the duties of his office, he was summarily removed by the Postmaster General, and afterwards, as stated by some telegram from the Postmaster General, it was concurred in by the President. It was treated as a removal by the President in the first instance. After receiving word of his removal, without any charges having been preferred against him, he protested; and he continued that protest throughout the entire period. The record will disclose that there was no lack of diligence on his part in objecting to his removal.

The suit was finally brought for the recovery of his salary in the Court of Claims. The Court of Claims has rendered a statement of findings, to which we take no exception; it is a very fair statement. And this Court will find stated in the appellant's brief, the statement of facts, quoted substantially as stated by the Court of Claims. Fortunately, there is no disagreement upon the question of facts, nor was there before the Court of

Claims. The Court of Claims, after fully considering the matter, decided they were with us on the facts, but against us on one question only, and that was the question of laches. That is to say, they attempted to bring this case within two or three decisions of this Court; and I will not take up the time of the Court to discuss those in detail, further than to call attention to the fact that there is a distinction between this case and all of the cases that have been cited. In fact, the lower court's own statement of its findings of facts would necessitate, if that were the only question involved, a judgment in favor of the appellant. The statements of facts are set out in the complaint, to the effect that this plaintiff was removed from office; he protested against the removal; he accepted no other employment; he continued to contest it up until the last moment expired for his successor to be appointed, and the name of his successor was not sent to the Senate. The Senate adjourned without a successor having been appointed; and then six or seven weeks afterward, he brought this suit.

The effect of the decision in this case is to hold that he is guilty of laches for not bringing the suit within the time required, the Court citing cases which we deem inapplicable.

If the conclusion of the Court of Claims is well founded, it would have been necessary for the appellant to have brought a suit immediately, or within a reasonable time, after each pay-day; he would have had to bring a suit every month. He brought his suit before the time expired in which the President could have sent to the Senate the name of his successor; several months before. Then, after the Senate had adjourned, and the time had expired in which the name could have been sent to the Senate, six or seven weeks . . . or less than eight weeks . . . he filed a supplemental complaint claiming his salary up to that time . . . in fact, he brought the

suit within seven weeks, when all is considered, of the expiration of the term.

The Government gives the man the right of action for wrongful dismissal; but if the application made by the Court of Claims is sound, he has a right without a remedy.

The only question before the Court, as I take it, under the admitted facts, is as to the constitutionality of the act which inhibits the President from removing an official, within this particular class designated by the statute, without the consent of the Senate. That the statute contains in effect a prohibition of the removal by the President of a postmaster of the first class without the consent of the Senate, I take it there is no dispute. The statute prohibits removal without it having been submitted to the Senate. I do not mean that it was necessary to send over a notice that he expected to remove this postmaster; and I will concede that sending the name of the appointee to succeed Mr. Myers would have been sufficient. But that was not done.

The Constitution of the United States specifies that the President may nominate for certain offices. Then it follows that with the provision that for all inferior officers appointment may be provided for by Congress, and may be delegated either to the President alone, to the heads of departments, or to the courts. The powers of the President of the United States are enumerated powers. Prior to the Constitutional Convention, all these powers were among the States. But when the Convention met, they decided upon having a head Executive. They delegated to him certain powers. Those powers are expressed in the Constitution. And there it is provided that the appointment of inferior officers may be delegated by Congress to the President alone, to the courts of law, or the heads of departments. It has been decided by this Court—I think unequivocally—that when it is delegated to the departments, Congress has the

power to provide that the removals can only be made by and with the consent of the Senate. *United States* v. *Perkins,* 116 U. S. 483.

The Court of Claims had held in that case that where Congress delegated the power to the head of a department, Congress had implied power to place restriction as to removal by the head of that department, and to require that it must receive the consent of the Senate. And the only difference between that case and this is that in that case the power was not delegated to the President. It was delegated to the head of an Executive Department. There is nothing in counsel's brief to indicate why there should be a distinction—so far as I can reason it out—between a delegation of power to the head of an Executive Department and the delegation of power to the President.

In the first instance, the whole delegation is vested in Congress, as it was before we had a Constitution; and the Constitution enumerates and specifies the particular offices to which the President might appoint, and makes the exception that the inferior officers shall be under the control of Congress.

With these few remarks, I believe I have stated the issues in this case, and will now leave the rest of the discussion in the opening to Senator Pepper, reserving the rest of my time for the closing.

Extract from brief of *Messrs. Will R. King* and *Martin L. Pipes,* for the appellant.

The defense of laches is untenable. *Norris* v. *United States,* 257 U. S. 77; *Nicholas* v. *United States,* 257 U. S. 71; *Arant* v. *Lane,* 249 U. S. 367; *id.,* 55 Ct. Cls. 327.

Forbidding removal of postmasters of the first class without the consent of the Senate is constitutional. Discussing the Act of June 8, 1872, c. 335, 17 Stat. 284; the Tenure of Office Act, April 5, 1869, 14 Stat. 430; 17 Stat. 284; *Parsons* v. *United States,* 167 U. S. 324; *Shurtleff* v. *United States,* 189 U. S. 314.

There is nothing in the Constitution relating to the President's power of removal. Under Art. II, § 2, cl. 2, Congress could vest power of both appointment and removal of postmasters in the Postmaster General. It would seem that, if it has the power to withhold from the President the power of appointment of a postmaster, it would also have the power, in the creation of the office, to limit the effect of an appointment made by the authority of an act of Congress, and therefore to limit the power of removal.

The power of appointment of postmasters, is not derived from the Constitution *directly,* but from a law of Congress, passed in pursuance of a power granted Congress by the Constitution. And since the power of the President in such case is derived from Congress, it would clearly seem to follow that the Congress can attach such conditions to the appointment as it sees fit. As to officers other than inferior officers mentioned in the section, of course the power of appointment, by and with the consent of the Senate, is a power vested in the President by the Constitution. Discussing *Porter* v. *Coble,* 246 Fed. 244.

Since the President's power of appointment of inferior officers is not absolute, but qualified and contingent upon the action of Congress, it follows that the power of removal, incident to the power of appointment, is also qualified and contingent upon the action of Congress; also that when Congress acts, and the contingency takes place, it is the act of Congress, in pursuance of the powers conferred by the Constitution, that vests both the power of appointment and the power of removal; and whether the act of Congress vests the power in the head of a department or in the President, *the power exists only by virtue of the act of Congress, and not directly by force of any constitutional provision.*

How can it be said that Congress " may vest " a power as to inferior officers if it has already been vested by the

Constitution? The plain meaning is that Congress is given plenary power to establish offices not created by the Constitution and to prescribe all the incidents and elements of the offices, including the authority to vest the power of appointment and of removal where it may deem proper, with the only limitation (if it be a limitation) that the appointing power must be in a court of law, a head of a department, or the President.

Since the power to remove is not mentioned in the Constitution, it follows that the President's power to remove an inferior officer is derived only from the recognized rule that the power to remove is incident to the power to appoint. That the President's power to remove does not exist in the President by virtue of the presidential office, is apparent from the fact that this power has always existed and been recognized in the heads of departments, where Congress has often placed it. It is so now in the case of fourth-class postmasters. The question is set at rest by *Eberlein* v. *United States*, 257 U. S. 82. See also *United States* v. *Perkins*, 116 U. S. 483.

Congress has by the Budget Law recently sustained its constitutional power to vest the power of appointment in the President and yet to reserve to Congress the power of removal,—this after a debate on the very question. The offices of Comptroller General and Assistant Comptroller General were created, who are to be appointed by the President, but removed for causes specified by joint resolution of Congress or by impeachment "and in no other manner." This act was signed by the President, June 11, 1921. If that law be constitutional, then the law here involved is constitutional.

Appointments exclusively within the jurisdiction of the Executive are specifically designated in Art. II. *Expressio unius est exclusio alterius.* It will be observed that the officers placed within the exclusive jurisdiction

of the President are to be nominated; the other refers to appointment. To nominate is to suggest and must first come from the Chief Executive, while to appoint requires the joint action of the two departments.

See Story, Constitution, 2d ed., §§ 1534, 1535, 1539-40; *United States* v. *Germaine,* 99 U. S. 510; *United States* v. *Perkins,* 116 U. S. 483.

The debates in Congress on the subject in 1789, and the few years following, together with such adjudications as appear on the subject, determined but one question (if anything), and that, as stated in *Ex parte Hennen,* 13 Pet. 259; *McElroth* v. *United States,* 102 U. S. 426; *United States* v. *Perkins, supra,* and other cases of similar import, was the power of the Executive to remove an official without the consent of the Senate *in the absence of any provision in the Constitution or statutes on the subject.* Whatever may be said of the congressional action in 1789, it must be conceded that for more than a half century, wherever and whenever the subject has been before Congress, the latter has, by its enactments, declared in favor of that interpretation of the Constitution, making valid any and all restrictions that it has seen proper to place upon the removal by the President, whether by the direct or implied consent of the Senate, or by compliance with forms of prescribed procedure under the civil service, or other laws.

Congress has the right to exercise all powers essential to the making of the provision of the Constitution respecting postoffices and post roads effective. *In re Rapier,* 143 U. S. 110.

Prerogatives of the President consist only of that which is clearly delegated, or incident to those enumerated, to the Executive. The silence of the Constitution upon the subject, in view of the historical conditions from which the Constitution emanated, and the evils which it sought to remedy, could more properly be said

to imply that in all circumstances Congress, and only that branch of the Government, should have control of the subject. Taft, Our Chief Magistrate and His Powers, p. 144.

The office of Comptroller General serves as an excellent example of the wisdom of the framers of the Federal Constitution in leaving the creation of the so-called inferior officers, together with the authority for their appointment and for their removal, by such one of the authorities as may be there designated, to the wisdom of Congress, as conditions might develop.

It would seem to be clear from a mere recital of the duties performed by the accounting officers since the days of the Continental Congress, that such duties are not executive, but judicial in their nature, and no more deprive the President of his duty to take care that all laws are enforced than do the District Courts of the United States which are likewise created by statute. This was clearly recognized by Madison (Debates in Congress, Annals, VI, 636), in the debate on the bill which became the Act of September 2, 1789, establishing the accounting offices. *Id.*, p. 638. The accounting officers were placed in the Treasury Department, over the protests of James Madison and others, where they continued to remain until the Budget and Accounting Act of June 10, 1921, made them independent of all of the executive departments. While they were administratively within the Treasury Department, it has been recognized throughout the history of the United States, that, until within the last three or four years, their discretion was not subject to the control of either their immediate superior, or the President.

The office of the Commissioner of Patents affords illustration of another important *inferior office,* of a class that the Constitution did not intend should come exclusively under the Executive respecting his power of removal. *Butterworth* v. *Hoe,* 112 U. S. 67

The President has no power to interfere with accounting officers in the performance of their duties. 1 Ops. Atty. Gen. 629; *id.*, 471; *id.*, 705, 706; 2 Ops. Atty. Gen. 509. The absolute independence of the accounting officers from control in their decisions by executive officials was recognized by Postmaster Kendall (whose authority was then as the Postmaster General's now), in his annual report of December 4, 1835. Ex. Doc. No. 2, 1st sess., 24th Cong., 399, 400. The Senate Committee summed the matter up in a report dated January 27, 1835. Sen. Doc. No. 422, 1st sess., 23d Cong.

Throughout the history of this Government, the President, Secretaries of the Treasury, and heads of Departments, with few exceptions, have disclaimed any authority over the accounting officers of the United States. See *United States* v. *Lynch,* 137 U. S. 280.

President Taft clearly recognized, in his message of June 27, 1912, transmitting the recommendations of the Commission of Economy and Efficiency, that there must be checks on the usurpation of power by the executive departments. House Doc. No. 854, 62d Cong., 2d sess.

Oral argument of *Senator Pepper,* as *amicus curiae.*

There are two questions before the Court which I shall discuss as clearly and briefly as I can.

With respect to the matter of laches, I submit that if an officer of the United States, claiming to have been illegally removed, who has protested continuously during the whole of the session to which his removal might have been reported; who has kept himself free from other employment and received no compensation from any other source; for whose successor no provision was made either by the President alone, or by the President with

the advice and consent of the Senate; who then brings his suit within six or seven weeks after the perfection of the cause of action—if he is to be denied a right of recovery on the ground of laches, the Government is handing to him with one hand the privilege of suing for the salary on the theory of unjustifiable removal, and with the other hand withdrawing the possibility of recovery, because the course of conduct which in that event would be prescribed for him is one which it would have occurred to few people to pursue.

I come now to the question on the merits.

The Solicitor General all but concedes that the language of the act under discussion evidences the intent of Congress that the Senate's consent shall be essential to removal as well as to appointment. The situation which confronts the Court then is this:

The Congress, in the exercise of an undoubted legislative power to create the office in question, creates it; prescribes the duties of the office; fixes the salary; specifies the term; and declares that the Senate shall have something to say with respect to removal, if removal is attempted. And the question is whether the Executive, having exercised his Constitutional right to appoint, with the advice and consent of the Senate, to the office which Congress has thus created, may ignore that part of the statute which specifies the conditions under which there may be a removal. The Congress in creating the office has declared that the responsibility of removal shall be the joint responsibility of the Executive and the Senate. May the Executive act under the statute, in so far as it creates the office, and may he ignore that portion of the statute which prescribes the conditions and circumstances under which a removal may take place?

I wish to emphasize as earnestly as I may that the issue in this case is not an issue between the President and the Senate. Except in newspaper headlines, there is no

such controversy. This is an issue between executive power and legislative power; and the question is where the Constitution has vested the power to prescribe terms of removal—whether in the Congress, as I contend, or in the President, as I think the Solicitor General must contend.

Here we have a constitutional "no man's land." It lies between the recognized lines of executive prerogative and of legislative power. The question is, who may rightfully occupy it? And the decision of this Court in this case will be of enormous significance in helping to clear up the question as to who may enter in and possess that area which up to date has been debatable.

The Act of 1876 is in no sense a bit of isolated or eccentric legislation. With the aid of one of the most efficient of Government agencies, the legislative counsel for the Senate, I have collated, as exhaustively as has been possible within the limits of the time for preparation, the statutes now upon the books, which in some degree undertake to place limitations upon the Presidential power or right of removal, if such a power or right exists.

Laying aside the case of officers whose tenure is prescribed by the Constitution, the Justices of this Court, and the federal judges generally, and turning to other officers for whose term or tenure the Constitution makes no provision, I suggest that the Court must choose between three theories. One is the theory that the power of removal is an executive power; that it is inseparably incident to the power of appointment; and that, since the Constitution places the limitation of Senatorial consent only upon the power of appointment, the inference is that the power of removal is left untrammeled and free. That, I take it, is the position which the Government must take here. It is the position which the Solicitor General took at the previous argument. It is a proposition the consequences of which, I think, he shrinks

from recognizing now; but in the last analysis it must be upon that proposition that the appellee must base its case.

Then there is the second proposition: that if the power of removal is a reciprocal of the power of appointment, then, since the Constitution has insisted that there shall be joint responsibility with the Senate in the case of appointment, the inference is that there is an intention that there shall be joint responsibility in the case of removal. There is very respectable authority in the books for that view; but for myself I confess that it seems to me to be unsound.

The third proposition is that which I venture to press upon your Honors: that the act of removing an officer is itself an executive act, but that prescribing the conditions under which that act may be done is the exercise of a legislative power, inseparably incident to the legislative power to create the office, to prescribe the duties of the office, to fix the salary, and to specify the term.

I am contending that it is only the act of removal that is executive in its character; and that prescribing the terms under which the removal may take place is a legislative act; a thing to be performed by Congress in the exercise of powers expressly granted, and under the power to pass all laws "necessary to carry the foregoing powers into effect," etc.

What is "*the* executive power" that is vested in the President? Not the vague executive prerogative which was resident in kings at the date of the adoption of our Constitution. It is the executive power which this instrument grants to him.

It is said, however, that this whole question has been settled by practice and by constitutional history in this country. I enter a flat denial. I think there has been a great misconception of what the testimony of history is in this matter. I call attention to the fact that when

you are discussing the origins of the Constitution, and debates in the Constitutional Convention, so far from finding material from which any inference can be drawn of the sort that the Solicitor General seeks to draw, the data are at least equivocal or even the basis of a contrary inference.

In the Constitutional Convention, Madison and others were in favor of vesting the power of appointment in the President alone, without the concurrence of the Senate. Pinckney and others were in favor of vesting the power of appointment in the Senate alone. Oliver Ellsworth was of opinion that the initiative of appointments should be with the Senate, and that the President should have only the power to negative. The report of Rutledge's committee, which was the conciliatory committee intended to reconcile the different views, brought in on the 6th of August, was to the effect that the making of treaties and the making of important appointments should be by the Senate.

Then came the compromise; and the compromise was that the Executive should make appointments, by and with the advice and consent of the Senate.

When you turn to contemporaneous exposition, absolutely the only utterance on the subject of removal that I can find in the interval between the action of the Constitutional Convention and ultimate ratification of the instrument by the States, is the utterance in No. 77 of The Federalist, usually attributed to Hamilton, which is to the effect that the assent of the Senate to removals will be necessary, as it is necessary to the appointments. I have cited in my brief a very interesting Illinois case (*Field* v. *The People,* 3 Ill. 79,) in which the court, after an examination of the authorities, gives reasons for believing that it was only upon a representation that the President would not have the power of removal that the Constitution could have been rati-

fied by the States; that if it had been supposed that the President had the power of removal, as an executive prerogative which the legislature could not curb, the Constitution never would have become effective as the fundamental law of the land.

When you come to the debates in the First Congress, of 1789, there is found no basis for the statement that those debates settled this question in favor of the presidential right of removal. I appeal to the record, because when this great tribunal declares the law we all bow to it; but history remains history, in spite of judicial utterances upon the subject.

When you turn to what actually took place in the Senate and in the House, you find that the issue which was before that Congress was an act to create a Department of Foreign Affairs, and to provide for the office of a Secretary of Foreign Affairs, to be appointed by the President, by and with the advice and consent of the Senate, and to be removed by the President.

A great controversy was aroused in the Senate and the House over the presence of the phrase "to be removed by the President." In the House an amendment prevailed, which was afterward accepted by the Senate, which side-stepped the question, after prolonged debate, by providing that if and when the Secretary of Foreign Affairs should be removed by the President of the United States, temporarily such-and-such things should happen to the records and books of the Department. That was upon a division following a debate, where, if you compare the way in which people voted with the way in which they spoke in the course of the debate, you find that no inference at all can be drawn from their vote as to whether they were voting that the President had the power of removal and needed not that it be conferred, or that he had it not and that Congress must confer it upon him; or that the President had not the power and that the Congress could not confer it upon him.

The most interesting analysis that I know of on the effect of debates and votes in a Congress is that contained in the judgment of Senator Edmunds, in the impeachment proceedings of President Johnson; where he analyzed the votes in the Senate and the House in that First Congress and came to the conclusion that you can not even guess as to what was the opinion of those who voted respecting the question at issue.

It will be remembered that in the First Congress there was a tie vote in the Senate. Only ten States were represented in the Senate at that time, there being twenty Senators. There was a tie vote, and John Adams, who was in the chair, cast the deciding vote and broke the tie, which carried the decision in favor of the measure as the House had amended it.

Now, I suggest that you can not draw any inference at all from those debates or from that vote, excepting that many of those who participated were believers in the power of the legislature; that many of those who participated were believers in the prerogative of the President; and that a clean-cut decision was obscured by a compromise.

When you come to the subsequent legislative history of this question, you will find the same difficulty in drawing historical inferences. The great confidence in President Washington contributed largely to such acquiescence as there was in those days in the theory of presidential power. Story testifies to it, as do many others of our great jurists. Jefferson made a great many removals; but he had both Houses of Congress with him, and no issue arose. The succeeding Presidents, Madison, Monroe, and John Quincy Adams, raised no issue with the Congress; although the Benton report made in 1820 showed apprehensions on the part of some statesmen that trouble was ahead if the existence of an executive prerogative was recognized.

Then came Jackson's administration and his removal of his Secretary of the Treasury because he would not obey the President in his direction to remove the Government deposits from the United States Bank. And as a result of that removal there took place a memorable debate in the Senate. The Senate was hostile to the Administration. The debate is notable for the remarkable arguments of Webster, Clay, and Calhoun. Those men have been quoted, and I admit in one or two instances referred to by former Justices of this Court in opinions, as having been advocates of the Executive prerogative of removal. Not so. Webster, after having made an argument to that effect, said that on reflection he had come to the conclusion that those who in 1789 claimed that this was a legislative power had the best of the argument, and that he would acquiesce merely for the time being in the passage of a law requiring the President to furnish Congress with his reasons for removals.

Clay took precisely the ground which I am taking here, that the act of removal is an executive act, but that the power to determine the conditions under which removal may be made is a great legislative power and is resident in the Congress.

Calhoun, in a great argument, went even further, and held that it was a power which was resident in the legislature alone and doubted whether it could be in any sense committed to the Executive.

I have supposed that under our system of government Congress can not confer executive power upon the President; that if it is a question of executive power you look to the Constitution. But I have supposed that the acts done by the Executive in the discharge of his duty faithfully to execute the laws, are such acts as those laws prescribe, and that where the Congress which makes the law declares that it is of the substance of the law that only such-and-such things shall be done in the execution of

it, that declaration is binding upon the Executive—not because it is clipping his power, but because it is a valid exercise of the power of Congress to declare how the incumbency of the office may be terminated. Let me illustrate:

Marbury v. *Madison* we think of always for the notable decision that this Court may declare an act of Congress unconstitutional. May I remind your Honors that, not by way of *obiter dictum,* but involved in the substance of the decision, was a decision by the great Chief Justice and the Court that an officer who had been appointed for a term was irremovable during that term by the President, except through the process of impeachment? That was a case in which Marbury and others had been named as justices of the peace of the District of Columbia by the President. Commissions had been signed by the President, had been sealed by the Secretary of State, and were in the office of the Secretary of State. An act of Congress conferred on this Court—or purported to—original jurisdiction to issue a mandamus; and in this case a petition was filed for a mandamus to the Secretary of State to compel him to deliver the commissions.

This Court decided, first, that when the commission had been signed and sealed and was in the office it was the property of the office-holder and must be delivered; second, that the duty to deliver it was not a political duty involving discretion, but was a ministerial duty which could be enforced by mandamus; that mandamus was the appropriate remedy at common law, but that this Court could not issue the mandamus because the attempt to enlarge its original jurisdiction was unconstitutional.

Some people have tried to get rid of that decision by a wave of the hand; by saying, "Oh, well, everything in it was *dictum* except the decision that there was no jurisdiction."

But the decision that there was no jurisdiction was reached only by declaring the act of Congress unconstitutional; and this Court never would have declared the act of Congress unconstitutional if they could have disposed of the case on the ground that this was an appointment which was revocable by the Executive, and that if they were to issue the writ to compel the delivery of the commission, the next day the President could recall it. Marshall so thought; and he said with admirable clearness that as long as the commission is unsigned or unsealed and in the hands of the President it is revocable, and therefore the officeholder has no rights and there can be no mandamus; but that the instant the duty to deliver it becomes ministerial, at that moment the duty must be performed, and it is a mere question of who is to compel the performance, because the appointee has tenure for his term. It is an interesting fact, may it please Your Honors, that in 1803 you have that significant utterance of Marshall's, too rarely commented upon in subsequent cases.

The Solicitor General in striving to find a middle ground between the alternative that there is a prerogative power of removal in the President and the proposition for which I contend, that the power to prescribe conditions of removal is legislative and inheres in Congress—the Solicitor General in attempting to find a middle ground and to save some laws that are on the statute books seems to me to concede my case.

A concession, for example, that Congress may declare a legislative policy respecting how an office is to be administered and for what causes the incumbent is to be removed is an end of the argument that the President must have a free hand if he is effectively to enforce the laws. It will not do to say that the President must have a free hand in the matter of determining when and how he shall remove and at the same time to say that Congress

may whittle away his freedom by prescribing the causes for which he may remove and the circumstances under which he may do it. To concede any power in the premises to Congress seems to me to be wholly inconsistent with the theory of a prerogative resident in the Executive, derived from the Constitution, in virtue of which he controls the officers of the United States. And with respect to them, I beg leave to say that the officers, incumbents of offices established by law, are officers of the United States; they are officers of the Government; they are officers of the people. They are not servants of the President.

I wish to call attention to that portion of section 2 of Article II of the Constitution which, after dealing with the manner of appointment of ambassadors, other public ministers, consuls, justices of this Court, and all other officers whose offices may be established by law, proceeds thus:

"But the Congress may by law vest [in the case of such inferior officers as may be from time to time established, the appointment either] in the President alone, in the courts of law, or in the heads of Departments."

I take it that "inferior officers" is a broad term and covers all officers not specified in the Constitution, and not heads of Departments. Certainly a postmaster is an inferior officer.

And I take it that if the Congress, under the Constitution, might have lifted the appointing power in this case out of the President altogether and vested it in the Postmaster General, then Congress has clearly the right, in vesting it in the President, to prescribe the terms upon which that vesting shall take place and how the power of removal shall be exercised. In the *Perkins* case, 116 U. S. 483, this Court decided that the power to vest the appointment in the head of a Department carried with it the power to prescribe conditions, including those affect-

ing removal. And it would be a distorted application of the prerogative theory of Executive power to say that Congress may vest the appointment of an officer elsewhere than in the President and retain control over the removal, but, having chosen to vest it in the President, may not annex conditions which concern the circumstances of removal.

Think of the psychology of this matter. In the long run, is it safer to vest this tremendous prerogative of terrorizing officers into conduct of the sort acceptable to the Executive through fear of removal, in the Executive; or can the power most safely be lodged, in accordance with age-old precedents, with the legislature? Of course, the legislature may abuse it, just as they abused it in the Tenure of Office Act. That was most unwise legislation passed confessedly to embarrass the President. But it was not unconstitutional.

It is said, however, that "It will be a cruel injustice if you hold the President accountable for enforcing the laws, but leave it in the power of the legislature to embarrass him in this way." But you are not going to hold the President accountable for failure to enforce an impossible law. The responsibility of creating a workable law is the responsibility of Congress; and attaching to the office conditions of removal which make it unworkable is a responsibility for which Congress must face the people.

Forensic argument and prophecy can build a great structure of calamity to result from denying to the President power to discipline people by terrorizing them through threat of removal. But you can equally well imagine acts of executive tyranny if you do concede the power. It is a question respecting the place most safely to lodge this great power.

The story, in English constitutional history, of the phrase "advice and consent" is coincident with the

whole story of the rise and development of English parliamentary government. I find the phrase first used back in the eighth century, in 759, when a Northumbrian king does such-and-such things with the "advice and consent" of his wise men. It comes down through Magna Charta. It comes down through all the ages. And when in 1787 it became necessary, as between those who were championing a strong Executive and those who were championing the legislature, to find a middle ground, it was provided, in the language of old English law, that such-and-such things should be done by the President "with the advice and consent of the Senate."

I accordingly close by urging Your Honors to set this controversy at rest once and for all by determining that the power to control removals is neither in the President nor in the Senate, but that, in accordance with the age-long traditions of English constitutional history, it resides in the Congress of the United States, where the Constitution has placed it.

Extract from brief of *Senator Pepper.*[1]

The Constitution puts the Justices of the Supreme Court and all of the Federal Judges in a class by themselves. They hold office during good behavior, and are removable only by impeachment. As to all other officers, whether named in the Constitution or not, there is absolute silence on the subject of removal. With respect to them the Court is confronted by three possible theories of removal. (These are stated in the oral argument, *ante,* p. 67.)

It is said that the Executive can not effectively execute the laws unless he has an unrestricted power of removal.

[1] Senator Pepper also filed a supplemental brief, prepared by Mr. Frederic P. Lee, Legislative Counsel of the Senate, giving a classified citation of existing statutes restricting the power of the President to appoint or remove officers. (See Sen. Doc. 174, 69th Cong., 2d sess.)

To argue thus is to beg the question. The laws which he is to execute are the laws made by Congress. The Constitution makes no vague grant of an executive prerogative, in the exercise of which the President may disregard legislative enactments. The executive power vested in him is only that which the Constitution grants to him. 9 Op. At. Gen. 516.

Whether or not a certain office shall be created is a legislative question. The duties of the official, the salary which he is to receive, and the term during which he is to serve, are likewise matters for legislative determination. Provision for filling the office is in its nature legislative, and so is provision for vacating it. The fact that the Constitution makes a specific provision in connection with the filling of the office works no change in the nature of the provision for vacating it. The actual removal is an executive act; but if it is legal it must be done in execution of a law—and the making of that law is an act of Congress. If the Constitution were silent in regard to appointment as it is silent in regard to removal, legislative action would be decisive in both cases. From the mere fact, however, that it is deemed wise to give to the Executive a limited power of appointment, no inference ought to be drawn that he is intended to have an unlimited power of removal.

The language of the second section of Article II of the Constitution is nicely chosen. The President is given the *power,* with the advice and consent of the Senate, to make treaties. Elsewhere he is similarly given the power to fill up vacancies during the recess of the Congress. But the executive right to make nominations and appointments to office when the Congress is in session is not described as a *power* at all. "He shall nominate, and by and with the advice and consent of the Senate, shall appoint." That which is laid upon him is an executive *duty.* His business is to effectuate the legislation of Con-

gress. From the existence of the duty no inference should be drawn of the grant of the power.

The power of control through fear is a dangerous power to lodge in the hands of any one person. It is far less likely to be abused when it is exercisable only by the vote of a large body of men than if it represents merely the determination of a single will. The case of the Comptroller General is a case in point.

At the present time the well-deserved public confidence in the President is equalled by the unpopularity of Congress. It must never be forgotten, however, that English-speaking people have found it wise to place their trust in the legislature, subject only to constitutional restraints. McElroy, Life of Grover Cleveland, Vol. I, pp. 166–168.

I find nothing in the record of the debates in the Constitutional Convention of 1787 from which it can be inferred that there was anything like a consensus of opinion respecting the exercise of the power of removal. It is clear that none of the members of the Constitutional Convention who took part in the debates desired the President to wield the powers which at that time were exercisable by the King of England. In the second place, it must be borne in mind that in the Constitutional Convention, Madison and others urged that the President alone, and without the consent of the Senate, should make appointments to office. See V, Elliott's Debates, p. 329. Others, like Roger Sherman and Pinckney, thought that the power of appointment should be in the Senate alone. *Ib.* pp. 328, 350. Oliver Ellsworth had suggested that nominations be made by the legislative branch, and that the Executive should have power to negative the nominations. In the report of Rutledge's Committee, made August 6th, it was provided that the Senate should have the power to make treaties and appoint ambassadors and Judges of the Supreme Court, and that the legislative branch should appoint a treasurer by

ballot. Finally, a compromise was reached under which it took the joint action of the Executive and the Senate to appoint as provided in Sec. 2, Art. II of the Constitution. No inference can be drawn, from a compromise reached under these circumstances, that it was the intention of the framers that the President alone should have the power of removal. If that inference were permissible, a similar inference might be drawn that the removal should be by the Senate alone. In the third place, it seems clear that it was not the intention of the framers of the Constitution that officers of the United States should be the officers or servants of the President. The mingling of the powers of the President and the Senate was strongly opposed in the Convention. See IV, Elliott's Debates, p. 401. Finally, it cannot successfully be contended that the power of removal was commonly vested in governors of States by then existing state constitutions. I, Congressional Debates, Pt. I, p. 490.

Nor can it be successfully contended that during the period when the issue of ratification was before the States the existence of any such power was conceded by the friends of the new instrument. I find no exposition of the intent of the framers of the Constitution during the period of ratification except that in No. 77 of the Federalist, attributed to Alexander Hamilton, which was to the effect that "the consent of the Senate would be necessary to displace as well as appoint." See *Field* v. *The People,* 2 Scam. 165.

When the first Congress met only ten States were represented in the Senate, which was composed of twenty members. Of these precisely one-half had been members of the Constitutional Convention. They were Oliver Ellsworth, William S. Johnson, Robert Morris, William Patterson, George Read, John Langdon, Caleb Strong, William Few, Richard Basset, and Pierce Butler. Of the fifty-four members of the House of Rep-

resentatives who voted, eight had been members of the Constitutional Convention, namely, Baldwin, Carroll, Clymer, Fitzsimmons, Gerry, Gilman, Madison, and Sherman.

The first Congress had before it a bill to establish a Department of Foreign Affairs, at the head of which should be an officer to be called the Secretary of the Department of Foreign Affairs, "who shall be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President." So far as the proceedings in the Senate are concerned, there is no complete record of the debate. We know that the vote on the passage of the bill was a tie, and that the deciding vote was cast by the Vice-President, John Adams. Our information respecting the views of individual Senators can be drawn only from the fragmentary notes of Mr. Adams. See Edmunds, Impeachment of Andrew Johnson, Vol. III, p. 84. Of the ten Senators who had sat in the Convention, six by voice or vote upheld the President's power and four opposed it. See Works of John Adams, Vol. III, pp. 407–412.

It is even more difficult to draw any certain inference from the proceedings in the House. In that body, when the bill was in committee of the whole, a resolution was offered to strike out so much of the bill as vested the power of removal in the President. On this question the yeas were twenty and the nays thirty-four. This vote, if considered without reference to the debates or to the subsequent parliamentary history of the measure, would tend to support the inference that a decisive majority was in favor of giving to the President the unrestricted right to remove a cabinet officer. It would of course throw no light whatever upon the question whether the President would have had any such right to removal if the Congress had not conferred it upon him. But the vote must be analyzed both in the light of the debates and in the light

of the subsequent fate of the bill; for when the bill came from the committee of the whole into the House an amendment was proposed to another portion of the bill making a certain disposition of the records of the office, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." It was thereupon declared that if this amendment prevailed it would be followed by a motion to strike out the substantive grant to the President of the power of removal as it had appeared in the bill when introduced. The amendment did prevail by a vote of yeas thirty-one and nays nineteen. The bill was finally passed in the House by a vote of yeas twenty-nine and nays twenty-two. When reference is made to the expressed views of the members of the House, as found in the debates, the analysis made by Senator Edmunds will be found in point. Impeachment of Andrew Johnson, vol. III, pp. 84–85.

The difficulty of drawing any certain inference from the votes and debates above summarized is a little relieved by the fact that on August 7, 1789, there was passed an act for the government of the Northwest Territory, which provided that the President should nominate and by and with the advice and consent of the Senate appoint officers where offices had been appointed by the Congress, and that the President should have the power of removal where Congress could remove. This recognition of a power of removal in Congress is inconsistent with the contention that the power of removal is exclusively an executive prerogative. Nor can any argument in favor of an executive power of removal be drawn from the course of subsequent legislation. In the Act of February 13, 1795, 1 Stat. 415, the proviso would appear to be a legislative attempt to construe the constitutional provision giving to the President the power to fill up vacancies and reserving to the Congress control over the appoint-

ment in case of vacancies. Congress may or may not have had in mind vacancies caused by removals.

In 1801 Jefferson removed many officers by executive acts, but the Senate and the House were overwhelmingly of his political faith. So that no question arose. The Presidents who succeeded him, Madison, Monroe, and John Quincy Adams, forced no issues with the Congress upon the subject of removals. It is to be noted, however, that on May 15, 1820, an act was passed providing that district attorneys, collectors of the customs, naval officers, etc., should be appointed for four years, but removable from office at pleasure. At whose pleasure is not stated. Presumably, the President's pleasure is meant. This act shows that the President and the Congress were of opinion that the Congress may by law fix the duration of the occupancy of an office by assigning him a term. From the power to specify a term it is easy to deduce a power in Congress to provide for the manner in which the incumbent of the office may be removed.

In 1826 a select committee of the Senate, of which Benton was chairman, and having among its members Van Buren and Hayne, submitted a report and certain bills, one of which was a bill to prevent the President from dismissing military and naval officers at his pleasure. The bill was not passed at that time, but a similar measure became law at a later date, to wit, on July 13, 1866.

In Washington's time there was enormous popular confidence in the President. In Jefferson's time there was political harmony between him and the Congress. In the days of his three successors no issues were forced. But when Andrew Jackson took office the question of the extent of executive power occupied a large share of the attention of Congress. His removal of Duane was followed by condemnatory resolutions of the Senate with a bill to repeal the first and second sections of the Act of May 15, 1820, and to limit the terms of service of certain

civil servants. The object of this measure was to limit executive patronage. It passed the Senate. Webster, Clay, and Calhoun expressed their views at length. Extracts from what these great men said in debate will show that it is altogether inaccurate to quote them as champions of the executive power of removal. Webster, Cong. Deb. No. 11, pt. I, pp. 458–470; Clay, *id.*, pp. 513–524; Calhoun, *id.*, pp. 553–563.

Webster was clearly of opinion that those who in 1789 argued in favor of the presidential power of removal had the worst of the argument, and that it should then have been decided that the power of removal was exercisable only by the President and the Senate. He regarded legislative practice as having mistakenly recognized the power to regulate the matter of removals as executive, but for the time being would be satisfied with a requirement that the President when removing should state his reasons to the Senate.

Clay held the view which in the instant case I am pressing upon the Court, namely, that since the legislative authority creates the office, defines its duties, and prescribes its duration, the same authority may determine the conditions of dismissal.

Calhoun was of opinion that the power to regulate removals was exercisable by Congress alone. What is here said with regard to the position of Webster is said with confidence, although I am not unmindful of the fact that in *Parsons* v. *United States,* 167 U. S. 324 (1896), the Court attributed to Mr. Webster a view which I venture to suggest was inferred from an isolated statement in the debate divorced from the context in which it was used.

In 1867 Congress passed the Tenure of Office Act over President Johnson's veto; and when, in disregard of the act, he undertook to dismiss Mr. Stanton, he was impeached by the House and tried by the Senate. The vote

for conviction stood yeas thirty-five, nays nineteen. He was therefore acquitted, the requisite two-thirds not having voted to convict. See views expressed in their opinions by Senators Sherman and Edmunds. III Impeachment of President Johnson, pp. 3, 5, 6; *Id.*, pp. 83, 84.

By the Act of April 5, 1869, which amended the Tenure of Office Act by ridding it of its most obnoxious features, the President might make removals but was required "within thirty days after the commencement of each session . . . to nominate persons to fill all vacancies." As a practical proposition, this placed it in the power of the Senate alone to obstruct removals (although Congress had imposed upon the Senate no responsibility respecting them) by withholding consent to the appointment of the successor unless actually satisfied with the reasons for the preceding removal. Against this limitation President Grant filed his protest, President Hayes urged repeal; and President Garfield denounced the senatorial usurpation.

During the recess of Congress, President Cleveland removed 643 officers, and within thirty days after the assembling of Congress sent to the Senate his nominations of persons to be appointed as successors to the removed officials. One of the removed officials was a federal attorney. The act under which he had been appointed did not undertake to vest the power of removal elsewhere than in the President. The case was therefore unlike the instant case. Before acting upon the nomination of his successor, the Senate Committee on the Judiciary requested the Attorney General to submit information and papers relating not only to the qualifications of the nominee but to the removal of his predecessor. The Attorney General, by direction of the President, refused to comply with the request. A heated controversy ensued. After vehement debate a resolution was passed—32 to 25—censuring the Attor-

ney General and, by implication, the President. The incident ended, however, somewhat in opera bouffe fashion by the discovery that the term of the removed official had expired before the Senate had passed its resolution of inquiry. There was therefore nothing to do but to confirm the appointment of the successor.

It was as a sequel to this conflict that what was left of the Tenure of Office Act was repealed, the repealing measure being signed by the President on March 3, 1887. As already pointed out, however, this repeal had no effect upon the Act of July 12, 1876, which is the act with which we are concerned in the instant case. While the joint operation of the Acts of 1869 and of 1887 leaves the President free to remove other members of his cabinet, the Postmaster General and postmasters of the first, second, and third class are removable only by and with the advice and consent of the Senate.

The act of removal is an executive act but the power to frame the law of which the act of removal is an execution is a legislative power and is vested in the Congress. If the Congress creates an office, prescribes its duties, the qualifications of the incumbent, and the salary paid to him, but makes no provision on the subject of removal, the inference is that the removal is intended to be at the President's discretion. If the Congress similarly creates the office and specifies in affirmative words grounds upon which the President may remove, it is nevertheless to be inferred that he may still remove at discretion because only negative words can displace this inference. If the creating act gives a term to the appointee, it might still be inferred, in the absence of other provisions, that the President may remove at discretion; but this proposition is inconsistent with the view expressed by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cr. 137. If the creating act specifies causes of removal and superadds a provision that there shall be removal for no other causes,

the inference is of an intention to limit executive removals to that extent. Probably the same inference should be drawn where the statute provides that the incumbent is to hold "during good behavior." If the statute creating the office provides that the President may remove only after affirmative action by another body, e. g., by a court-martial, the possibility of executive removal is to this extent limited. If the creating act (as in the instant case) provides that removal shall be the joint responsibility of the President and the Senate, the President may not remove without the consent of the Senate. If the creating act provides that removal can take place only after action by both Houses of Congress, this also is a constitutional use of legislative power.

The decisions of this Court are not in conflict with any of the positions above summarized. *Marbury* v. *Madison,* 1 Cr. 137; *Matter of Hennen,* 13 Pet. 230; *United States* v. *Guthrie,* 17 How. 284; *United States* v. *Perkins,* 116 U. S. 483; *Parsons* v. *United States,* 167 U. S. 324; *Shurtleff* v. *United States,* 189 U. S. 311; *Wallace* v. *United States,* 257 U. S. 541.

The cases above cited are believed to be the only decisions of this Court in which the question at issue has been touched upon. It is undeniable that the historical summaries contained in the several opinions tend to conclusions favorable to the contention now made on behalf of the appellant. For the reasons heretofore given, and with the greatest possible deference, it is suggested that these summaries may well be supplemented by a further consideration of the whole subject in a case which happily comes before the Court for decision at a time far removed from the transaction which gave rise to it and when the Court is unembarrassed by any pending conflict of opinion between the legislature and the Executive.

As to the argument *ab inconveniente,* two observations may be made: first, that constitutional liberty is more

vital than governmental efficiency; and, second, that the inconveniences which can result from the legislative regulation of removals are imaginary rather than real.

Oral argument of *Solicitor General James M. Beck,* for the United States.

The Government recognizes that it can not sustain this judgment on the ground of *laches.* Unless, therefore, the Act of July 12, 1876, be unconstitutional, the judgment must be reversed.

I therefore address myself to this great constitutional question—a question which has repeatedly been submitted to this Court, but which the Court up to the present hour has found it unnecessary to decide; a question of great delicacy, because it affects the relative powers of two great departments of the Government.

If I understand the distinguished Senator's contention, it is this: that the President's power of removal is not a constitutional power; that he derives nothing from the Constitution, under which the "executive Power" was vested in the President of the United States; nothing by reason of the solemn obligation imposed upon him by that Constitution to "take care that the laws be faithfully executed"; nothing by the oath which the Constitution exacts from him that he will support, maintain, defend, and preserve the Constitution of the United States; that his only power in this vital matter of administration of removing officers is derived from the inaction of Congress, which has plenary power over the subject of removals from office. It seems to me an amazing proposition.

Senator Pepper would sustain the law on the ground that Congress was not obliged to create the position of postmaster of Portland, Oregon; and therefore could create it upon such terms as it pleased, and if so, those conditions are beyond judicial review. In other words, Con-

gress can provide—as it has provided in the statute under consideration—that the postmaster at Portland, Oregon, should serve during the pleasure of the Senate. If this be true, then the Executive power of removal, hitherto supposed to be granted by the Constitution to the President, is no longer in the President, but when Congress creates the office it may reserve Executive powers to the Senate.

If appellant's argument be a sound one, Congress, in creating the offices of the Government, can do so under conditions which would transfer governmental power from the Executive to the Legislature. If so, where does the power to alter the Constitution's distribution of powers end? Thus there could be created two executive departments, one the executive department of the Constitution, which would be shorn of its powers and its halls like the poet's "banquet hall deserted," which the President would tread alone with "all but him departed," and the other, a congressional executive department, which would function independently of the President and be responsible only to Congress and removable only by Congress.

But if Congress has this power, then it has equally the power to delegate to any part of itself the executive power or function of removal. In the statute now under consideration, Congress has not itself assumed the power to control the removal of this postmaster. It has delegated it, primarily, to the President of the United States, but, ultimately, to the Senate. Under this theory, it could delegate the ultimate decision as to removals to the President, the Vice-President, as presiding officer of the Senate, and the Speaker of the House. Thus would be revived the triumvirate of Rome, for there would be three great officers of the State, sharing that which is vital in the practical administration of the Government, the removal of unworthy or inefficient officials from the public service.

The Constitutional Convention rejected a triumvirate when they refused to have an Executive of three individuals.

It is not necessary in this case to determine the full question as to this power of removal. This Court can say that this particular Act is unconstitutional, without denying to the Congress the power to create legislative standards of public service, which have a legitimate relation to the nature and scope of the office, and the qualifications of the incumbent.

I do not concede that a law, which thus subjects the power of removal to congressional conditions, is constitutional; but it is not necessary to decide that in this case. For this law differs, *toto caelo,* from a law which prescribes a standard of service. It declares no public policy with respect to any attribute of an office. There is no legislative standard of efficiency; it is a mere redistribution of power—a giving to one branch of Congress some of the power which belongs to the President.

The President's right of removal is not an implication of the Constitution, but a fair interpretation of its language; an interpretation that has had the sanction and confirmation of unbroken usage.

The great defect that called the Constitution into being was that under the Confederation all judicial, executive, and legislative powers were vested in the Congress of the Confederation. And it was because the Continental Congress exercised executive power that there came the tragedy of the Revolution, and especially the dark and terrible days of Valley Forge, when Washington's little army starved in a land of plenty, because of a headless Government that had no Executive, but which, under the guise of a legislative tribunal, attempted to exercise both legislative and executive powers. The result was that, when the Constitution was formed, quite apart from the teachings of Montesquieu as to the distribution of power

as a safeguard of liberty, the one thing that they were anxious to create was a strong, independent Executive, who, carrying out the laws of Congress, would yet have sufficient inherent strength to preserve his department against the creation of a parliamentary despotism.

In the debates of the Constitutional Convention, it must be admitted that there is very little to be found on this subject. They did discuss the question of removal, so far as the office of President is concerned, because he could not remove himself; and so far as the judiciary is concerned, they intended to give the judges a life tenure and necessarily made some provision for removal for extraordinary reasons. They did assert—and this is the answer to Senator Pepper's charge of executive absolutism—a power in the legislature, to be traced to the old Anglo-Saxon reliance upon the legislature as the ultimate safeguard of liberty, that if the President, in the exercise of his executive functions, wilfully failed in his duty—if he tolerated dishonest, inefficient, or disloyal men in the Executive Department—he or any other officer of the State could be impeached by the House of Representatives, tried by the Senate, and removed from office. But with that exception, there was no suggestion in the debates with respect to the power of removal.

At that time, in the science of government, according to the custom of the nation from which we drew our institutions in great part, and according to the custom of every country, so far as I know, the power to appoint and the power to remove had always been regarded as executive functions.

[In answer to interrogations from the Bench:] No one questions that the Congress, if it vests in the Postmaster General the appointment of a postmaster, can restrain the Postmaster General from removing his subordinate. Congress has control over those upon whom it confers

the mere *statutory* power of appointment. But it has no such power as against the President; because the President's power is not statutory; it is constitutional. In my judgment, the President can remove any one in the Executive Department of the Government. The employees of the judicial branch of the Government and the special and direct employees of the Congress, like the Sergeant at Arms, are not officers of the executive branch of the Government, and therefore are not within the grant of executive power to the President. That is one theory. The other theory is the one I first suggested, that the executive power is even more comprehensive. But it is not necessary for me to press the argument that far.

As Mr. Madison showed in the first great debate on this subject, the power to remove is not a mere incident and is not solely attributable to the power to appoint. It has a much broader basis.

To assume that the only source of the power to remove is the power to appoint is to put the pyramid on its apex; whereas you put the pyramid on its base when you say that the power to remove is part of that which, in sweeping and comprehensive and yet apt phrase, is denominated the "executive power," coupled with the explanation that the executive power is to "take care that the laws be faithfully executed," a mandate of tremendous significance and import.

The Constitution, in addition to this division of the Government into three great branches, draws this significant distinction between the grant of legislative power and the grant of executive power: In the grant of legislative power, it said (and it never uses a word idly): "All legislative powers *herein granted* shall be vested in a Congress." And when you come to look at the "powers herein granted," you will search in vain for any suggestion of a power to remove by the Congress.

The most one can say is that, under the general power, the omnibus clause of the legislative grant, namely, the power to make laws "for carrying into execution the foregoing powers," there is the implied power to create offices, and according to the theory advanced by opposing counsel, the resultant power to step over the dead line into the Executive Department and assume the right of removal.

When you come to the executive branch of the Government, it is significant that the framers omitted the words "herein granted." Why? They could specify the nature of and classify the legislative powers with reasonable precision. But the executive power was something different. And therefore they simply said "the executive power," not "the executive powers." It was not only in the singular number; but it was intended to describe something that was very familiar to them, and about which they did not believe men could disagree; and therefore they said, remembering the innumerable ills of the old Confederation, "the executive power."

It was not granted to an Executive Department. That is, again, a very significant thing. They might have limited it. But they said: "The executive power shall be vested in a President of the United States"—distinguishing him from all other servants of the Executive Department, and making him the repository of this vast, undefined grant of power called "the executive power." Then they went on to say what that power was—not in any way attempting to classify or enumerate it; but they simply gave its objective, and that was "to take care that the laws be faithfully executed."

It was common sense in the days of the Fathers, when our country was a little one; it is common sense today, when we are the greatest nation in the world; when we have, as I say, 800,000 employees of the State—that the President can not take care that the laws are faithfully executed, unless he has the power of removal, and the

summary power of removal, without any interference or curb upon him. And that has been shown again and again in our history.

But the Constitution did not stop there. There is a clause to which very little significance has been attached in the discussion on this question, but which I submit has great significance. It says that the President shall "commission" officers. There was special significance in the minds of the framers when, in this broad grant of "executive power," they said that the President should commission. Thus there are four steps—nomination; confirmation; appointment; commission. Nomination implies in its very essence the power of removal. It is the power to select at all times and at all places the best man for a position. In the matter of an existing office, the power to nominate includes the power, if necessary, to remove an existing incumbent, to make way for a better man.

Then comes the one qualification of the Constitution: That as to all offices which the Congress may think sufficiently important, no one can be appointed except with the advice and consent of the Senate. It is significant that, while the power of appointment is subject to the confirmation of the Senate, nowhere is there a suggestion in the Constitution that in the conceded power of removal, as an executive power, any such limitation has been put upon it. The power of appointment required local information. At all events, it was a matter in which the framers might well say that the ambassadors of the States desired to be consulted. But when a man has been taken from his locality and has become a part of the federal machinery; when he has been for one or more years under the supervision of the President, who knows best whether that man is faithfully or unfaithfully discharging his duties? How can the Senate know?

From those grants of power; from the nature of the Government; from the division into three different de-

partments; from the sweeping grant of executive power; from the power to nominate; from the duty of taking care that the laws be faithfully executed; from the power to commission, importing a continuation of that confidence which the President, in the very text of the commission, reposes in the appointee—from all those things, I assert that it is a just interpretation of the Constitution, and not a mere implication, that the power to remove is a part of the executive power granted to the President.

This question was discussed very ably about 136 years ago. Mr. Webster, who, in his antipathy to President Jackson, did take advanced ground in that direction—but not going to the great lengths of Senator Pepper—still recognized the tremendous force of the judgment that was reached in the First Congress of the United States. What was the result of that debate? The House of Representatives sustained Mr. Madison. The Senate equally divided; but Vice President Adams in the chair voted for the law in the form that would sustain the President's prerogative. And George Washington, the first President of the United States, the presiding officer of the Constitutional Convention, added his concurrence to the view thus expressed, and would have acted upon it if he had had any occasion to exercise the power of removal.

The first Congress of the United States, which one might almost call an adjourned session of the Constitutional Convention, so determined it. And from that day until it was challenged in Jackson's time, a period of nearly half a century, there never was a question as to the power of the President, nor any attempt by Congress to regulate or curb it. That great controversy was determined in Jackson's favor. And then the question never arose again until the "tenure of office" acts in President Johnson's administration, and these acts resulted—if I may use a pragmatical argument—in one of the most discreditable chapters in the history of this country. And

now, more than a half century later, as a part of the "irrepressible conflict" between the Congress and the Executive, Congress again raises the question in its most offensive form in the Comptroller General act.

If you take my middle ground, that Congress may guide and direct the discretion of the President by such statutory qualifications as are properly inherent in the nature of an office, but without disturbing the power of removal as the Constitution vested it, Congress can not destroy the independence of the Executive. But if you take Senator Pepper's view and that of his colleague, the power of Congress to put the President in a strait-jacket is unlimited.

This is a grave question. The men who framed the Constitution honestly believed that we could never succeed through a legislative despotism. I am quite willing to concede also that they believed that our nation could not endure an executive despotism. I am not contending for an executive absolutism; but I am protesting against a legislative absolutism.

The CHIEF JUSTICE. Mr. Beck, would it interrupt you for me to ask you to state specifically what your idea is in regard to the middle ground to which you referred? What kind of a method did you mean?

Mr. BECK. Well, I instanced one case, Mr. Chief Justice. I will try to give two or three illustrations: Take, for example, the kind of law I first cited, a law that says that an office is created and that the President shall appoint somebody to the office, and that he shall be removable for inefficiency and dishonesty. That largely leaves the President's prerogative untouched.

The CHIEF JUSTICE. Do you mean that he still would retain the power of absolute removal without having any such cause as that mentioned in the statute?

Mr. BECK. Exactly. And he would apply the legislative standard that had been given to him, *viz*, whether the incumbent was inefficient or dishonest.

Suppose the Congress creates an office and says that it shall only be filled by a man learned in the law; and suppose it further provides that, if a man ceases to be a member of the bar, he shall be removed. I am not prepared to say that such a law can not be reconciled with the Constitution. What I do say is that, when the condition imposed upon the creation of the office has no reasonable relation to the office; when it is not a legislative standard to be applied by the President, and is not the declaration of qualifications, but is the creation of an appointing power other than the President, then Congress has crossed the dead line, for it has usurped the prerogative of the President.

The power to suspend, within the interpretation of the Constitution, is only part of the power to remove. No one contends now that impeachment is the only way. There has never been since the first Congress a contention that, unless Congress affirmatively requires the consent of the Senate to a removal, the Senate concurrence is necessary. You need not determine in this case whether Congress may not reasonably regulate and control or guide the discretion of the President as to the act of removal, so long as it does not impair his essential power of removal. I do not want to question any part of the great prerogative of the President by conceding, or by inviting this Court to say, that there is any power of control which would prevent the President, in a case properly within his discretion, from exercising the power of removal in the teeth of an act of Congress.

The *amicus curiæ* argues that the genius of our race requires that the last hope of the people shall be reposed in the legislative branch of the Government. I reply that such last hope is reposed in neither the legislative branch, nor the executive. It is reposed in the Constitution of the United States, which has seen fit to divide the powers in such a way that neither of these three great departments can monopolize the powers of government.

The Constitution preserved such equilibrium; it takes away from the President the temptation to remove any important official without cause, because the moment he appoints a successor the Senate must be consulted. Moreover, Congress has its power over the purse strings. It has the power of impeachment. It can abolish the office altogether. It can fully legislate as to the nature of offices, which it creates, but it can not create an office upon conditions which change the fundamental nature of our Government.

If it is within the power of Congress to create offices in such a way and by such methods as to redistribute the powers of government, then the Constitution will, sooner or later, become, by Congressional usurpation, a house of cards.

Our form of government is a magnificent edifice, erected by a hundred and thirty-six years of patient sacrifice and labor. It has its "cloudcapped towers;" its "gorgeous palaces;" its "solemn temples"—and this great Court is such a temple. But if the Court should sustain appellant's contention, this noble edifice of constitutional liberty might one day become an "insubstantial pageant faded," and posterity might then say that it was not the work of supremely great men, but of muddled dreamers, for it would be of "such stuff as dreams are made of."

Extract from the brief of *Solicitor General Beck* and *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, for the United States.

The statute can be held unconstitutional without assuming the absolute power of the President to remove any executive officer. It may, in creating the office, limit the duration of the term thereof.

In the present case, no legislative standard is prescribed and no general policy laid down, except that the President may not exercise his executive function of re-

moval except with the consent of the Senate. This necessarily associates the Senate with the President in the exercise of a purely executive function. Such a law does not regulate the power of removal.

There may be a middle ground between absolute power in the President to remove and absolute power in Congress to control removal. The power of removal may be subject to such general laws as do not destroy the exercise by the President of his power of removal, but allow its exercise subject to standards of public service. If this "middle ground" does not commend itself to the Court, then the broader question becomes whether the power of removal is a constitutional prerogative of the President and, as such, can not be regulated by Congress.

On this theory, Congress may undoubtedly control the power to regulate the removal, when exercised *by any other official,* to whom the power of appointment has been delegated (for they owe their power of appointment solely to Congress,) and unquestionably the Congress can grant to other officials—such as the heads of departments—the power of appointment upon any conditions as to the power of removal by them that it thinks proper. The power of the President, however, is not *statutory,* but *constitutional.* As it is indisputable that the removal of a civil servant is essentially an executive power, it must follow that, as executive power is vested in a President, the power of removal inheres in him as a part of his prerogative, except where such power is expressly limited by the Constitution. It cannot now be seriously contended that the removal by the President of civil officers, who are his subordinates, must await the slow process of impeachment.

From the beginning of the Government removal has been recognized as essentially an executive function. In no sense is it either judicial or legislative. The only question, therefore, is whether Congress by reason of its

legislative power can control the exercise by the President of his executive power of removal; and that power of removal does not depend upon any implication of the Constitution but upon the well-considered delegation of powers in the Constitution itself. A cursory examination of the constitutions of many modern States discloses that, with one or possibly two exceptions, no power of removal is expressly given and that it is invariably treated by necessary implication as a function of the executive. This Court has often recognized that the power to remove is a necessary incident to the power to appoint, and that it is an executive power.

There seems to be but one explanation for the failure of the Constitutional Convention to discuss the question of removal (except in respect of the President and the judges); they regarded it as axiomatic that the power to remove was an executive power and that it was included within the grant of "executive power" to the President and the special grant that he should "take care that the laws be faithfuly executed." Under the Articles of Confederation, the Congress had the power of removal, but the Virginia Plan contemplated the transfer of such "executive rights" to the national executive. The Virginia Plan was the Constitution in embryo. That constitution, as finally developed by the Committee on Style, commenced with three separate articles, which were intended to carry out the division of powers, then so generally recognized. The various powers respectively assigned to each of the trinity were classified with admirable precision in the three Articles; and the attempt to keep them separate and distinct, except in so far as the Constitution expressly interblended them, is clear. There is, however, a very significant difference between the first sections of Art. I and Art. II, respectively. Art. I, § 1, provides: "All legislative Powers *herein granted* shall be vested in a Congress of the United States." Art. II, § 2, provides: "*The*

executive Power shall be vested in a President." It does not use the words "herein granted," nor does it speak of a class of powers as the preceding section, but it speaks of the "executive power;" and the executive power, as understood at that time in the science of government, always included both the power to appoint and the power to remove.

No attempt was made to specify the various kinds of executive power, as was done in respect of the legislative. Remembering the impotence of the Confederation because of its lack of an executive, the Framers desired to give to the President the fullest "executive power," except where they limited it; but, without defining, they indicated the nature of that power by several sweeping phrases. Upon him was the great obligation to "take care that the laws be faithfully executed" and he "shall commission all the officers of the United States."

To grant a commission was a prerogative of the Executive,—in England the "Crown,"—as distinguished from the legislature. Every officer of the State in England at that time received his commission directly or indirectly from the King. The Framers departed from this model by the requirement that the Senate should consent to the appointments. But, having consented, the function of the Senate ends, and the commission of every high federal official comes to him not from Congress, which created the office, but from the President. The commission recites that the President "reposing special trust and confidence" does appoint—and "authorizes and empowers—to execute and fulfill the duties of the office." This is something more than a clerical detail; and, reading it in connection with the British theory that the executive and not the legislature was the fountain head of political preferment, it means that it is the President who commissions. Even after the Senate has consented to the

appointment, the President may still refuse to deliver the commission and invite the Senate to concur in another selection.

If Congress can require the concurrence of the Senate in the removal of officers of the Army and the Navy as against the President's power of removal, then the President's power as Commander in Chief is potentially as weak as was that of Washington when he commanded the American Army, between 1775–1781, and the officers and soldiers of the States came and went at the pleasure of those States.

In three respects only did the Constitution limit the executive power of the President: *viz.*, the declaration of war, the making of treaties, and in the making of appointments.

A clear distinction is made between nomination, appointment, and commission—three stages, in only one of which does the Senate participate. To nominate is to select the best man for a given position. Charged with the responsibility to the people for faithful execution of the laws, the President must have the power to select the human agencies through whom he discharges his duties, if he is to meet the responsibility. The only constitutional limitation upon the President's power of selection is that he cannot appoint the higher officers until he has first obtained the advice and consent of the Senate. This restriction, being an exception to a general grant, must be limited to the fair meaning of the words used. Nowhere is there a suggestion that the President's power to remove, which the Constitution takes for granted as a part of the executive power, must likewise be effected with the advice and consent of the Senate. To justify this exception, it is necessary to read words into the Constitution which are not there.

It can not be argued that the Framers of the Constitution did not take into account the possibility that removals

would be necessary. Where they intended a servant of the State to have a life tenure they said so. Only judicial officers were thus to serve. They knew that the President would necessarily discharge his duties through many civil servants. The very form of the Government was a great experiment. It all depended upon the wisdom of those who should conduct its operations. It is quite obvious that they must have recognized that the selection of civil servants would inevitably be attended by many errors in judgment. With all this in mind, it seems inconceivable that they could have intended that no officer should be removed except with the consent of the Congress—often not in session—or that their careful restriction of the senatorial power of confirmation to the appointment of public servants should apply also to the very different question of a removal of those servants. There was substantial reason why they should thus qualify the power of appointment, for intercommunication between the constituent States was very inconsiderable; and if the patronage of the Government was to be distributed, no President would have the local knowledge to select the men from various localities. But after appointment, the President became the best judge as to whether the retention of an official was in the interests of the public service.

There remains, however, the final clause, which, if it stood alone, would justify the implication of the President's power to remove; for Article II, § 3, provides that the President "shall take care that the laws be faithfully executed." If he fail in this duty, he may be impeached. Apart from impeachment, the people may refuse to give him another term of office. His reputation is vitally concerned in the ability to do those things which this grave responsibility requires. It would be a cruel injustice to the President to hold him responsible for the faithful execution of the laws, if he has no control

over the human agencies whom he must, of necessity, employ for this purpose.

While this Court did not find it necessary in *Parsons* v. *United States,* 167 U. S. 324, to base its decision upon the constitutional rights of the President, its review of the history of the subject shows that the overwhelming weight of authority is in favor of the President's power to remove from office, so that it seems clear that, if necessary, the Court would have then held that an act depriving the President of this power was unconstitutional. A contemporaneous legislative exposition of the Constitution acquiesced in for a long term of years fixes the construction to be given to its provisions. *Stuart* v. *Laird,* 1 Cr. 299; *Briscoe* v. *Bank of Ky.,* 11 Pet. 257; *Burrow-Giles Co.* v. *Sarony,* 111 U. S. 53; *Ames* v. *Kansas,* 111 U. S. 449; *Cooper Mfg. Co.* v. *Ferguson,* 113 U. S. 727; *United States* v. *Philbrick,* 120 U. S. 52; *United States* v. *Hill,* 120 U. S. 169; *Robertson* v. *Downing,* 127 U. S. 607; *Schell's Exrs.* v. *Fauche,* 138 U. S. 562; *Field* v. *Clark,* 143 U. S. 649; *Ex parte Grossman,* 267 U. S. 87. Blaine, Twenty Years of Congress, II, p. 270.

[The brief then reviews at length the arguments in the first Congress touching the President's power of removal, citing: Annals of Congress; Life and Works of John Adams, III, 407–412; Journal of William Maclay, 109–118; Letters, Madison to Patton, March 24, 1834; Madison to Edward Coles, October 15, 1834; Madison to Adams, October 13, 1835.]

The law which was then enacted received the approval of George Washington, the President who had presided over the deliberations of the Constitutional Convention, and the principles which it recognized were thereafter accepted without question for generations and until, in the fiery passions of the Civil War, the enemies of Andrew Johnson sought to cripple him. In its legislation

Congress recognized that the President's power to make removals arose from the Constitution itself and not from any federal legislation.

Presidents of the United States have repeatedly made removals from office without asking for the consent of the Senate. For example, Adams, when Vice President, in 1789 cast the deciding vote in recognition of the President's power, showing the opinion which he had formed during the debate in the Senate. In May, 1800, as President, he acted upon this opinion by summarily discharging Pickering from the position of Secretary of State after the Secretary had refused to resign. Life and Works of John Adams, IX, p. 55. Jackson, in 1833, dismissed Duane, as Secretary of the Treasury. Sumner, Andrew Jackson, p. 354. Later many Attorneys General advised their official chiefs of the power of the President to make removals from office. Legare, in 1842, 4 Op. At. Gen. 1; Clifford, in 1847, 4 Op. At. Gen. 609; Cushing, in 1851, 5 Op. At. Gen. 223; Devens, in 1878, 15 Op. At. Gen. 421. Jackson, on February 10, 1835, declined to comply with a resolution of the Senate requesting the charges which caused the removal of an official from office. Messages of the Presidents, III, p. 133. Johnson vetoed the Tenure of Office Act on March 2, 1867, upon the ground that it was unconstitutional. *Id.*, VI, p. 497. Grant, December 6, 1869, recommended total repeal of that Act. *Id.*, VII, p. 38. Cleveland, March 1, 1886, denied the right of the Senate to require his reasons for removing officials. *Id.*, VIII, p. 379. Wilson, in the last year of his administration, vetoed the bill for a national budget because in § 303 it provided that a Comptroller General and an Assistant Comptroller General should be appointed by the President with the advice and consent of the Senate, but that they should be removable only by concurrent resolution of both Houses of Congress for specified causes or by impeachment. Cong. Rec., June 4, 1920, pp.

8609, 8610. President Coolidge took a strong position upon the power of the President to remove an officer of the Government without the consent of the Senate and the impropriety of Senatorial interference in favor of or against his exercise of that power. Cong. Rec., vol. 65, pp. 2245, 2335, 2339.

Mr. Will R. King, for the appellant, closed the argument.

Mr. Chief Justice Taft delivered the opinion of the Court.

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers, appellant's intestate, was on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oregon, for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate Committee on Post Offices, asking to be heard, if any charges were filed. He protested to the Department against his removal, and continued to do so until the end of his term. He pursued no other occupation and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71. In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920.

The Court of Claims gave judgment against Myers, and this is an appeal from that judgment. The Court held that he had lost his right of action because of his delay in suing, citing *Arant* v. *Lane,* 249 U. S. 367; *Nicholas* v. *United States,* 257 U. S. 71, and *Norris* v. *United States,* 257 U. S. 77. These cases show that when a United States officer is dismissed, whether in disregard of the law or from mistake as to the facts of his case, he must promptly take effective action to assert his rights. But we do not find that Myers failed in this regard. He was constant in his efforts at reinstatement. A hearing before the Senate Committee could not be had till the notice of his removal was sent to the Senate or his successor was nominated. From the time of his removal until the end of his term, there were three sessions of the Senate without such notice or nomination. He put off bringing his suit until the expiration of the Sixty-sixth Congress, March 4, 1921. After that, and three months before his term expired, he filed his petition. Under these circumstances, we think his suit was not too late. Indeed the Solicitor General, while not formally confessing error in this respect, conceded at the bar that no laches had been shown.

By the 6th section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179, under which Myers was appointed with the advice and consent of the Senate as a first-class postmaster, it is provided that

"Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

The Senate did not consent to the President's removal of Myers during his term. If this statute, in its requirement that his term should be four years unless sooner removed by the President by and with the consent of the

Senate, is valid, the appellant, Myers' administratrix, is entitled to recover his unpaid salary for his full term, and the judgment of the Court of Claims must be reversed. The Government maintains that the requirement is invalid, for the reason that under Article II of the Constitution the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate's consent was legal and the judgment of the Court of Claims against the appellant was correct and must be affirmed, though for a different reason from that given by that court. We are therefore confronted by the constitutional question and can not avoid it.

The relevant parts of Article II of the Constitution are as follows:

"Section 1. The executive Power shall be vested in a President of the United States of America. . . .

"Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be estab-

lished by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

"The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

"Section 3. He shall from time to time give to the Congress information of the State of the Union and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

"Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors."

Section 1 of Article III, provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior. . . ."

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested, was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as Section 4 of Article II, above quoted, provides for removal from office by impeachment. The subject

was not discussed in the Constitutional Convention. Under the Articles of Confederation, Congress was given the power of appointing certain executive officers of the Confederation, and during the Revolution and while the Articles were given effect, Congress exercised the power of removal. May, 1776, 4 Journals of the Continental Congress, Library of Congress Ed., 361; August 1, 1777, 8 Journals, 596; January 7, 1779, 13 Journals, 32–33; June 1779, 14 Journals, 542, 712, 714; November 23, 1780, 18 Journals, 1085; December 1, 1780, 18 Journals, 1115.

Consideration of the executive power was initiated in the Constitutional Convention by the seventh resolution in the Virginia Plan, introduced by Edmund Randolph. 1 Farrand, Records of the Federal Convention, 21. It gave to the Executive "all the executive powers of the Congress under the Confederation," which would seem therefore to have intended to include the power of removal which had been exercised by that body as incident to the power of appointment. As modified by the Committee of the Whole this resolution declared for a national executive of one person, to be elected by the legislature, with power to carry into execution the national laws and to appoint to offices in cases not otherwise provided for. It was referred to the Committee on Detail, 1 Farrand, 230, which recommended that the executive power should be vested in a single person, to be styled the President of the United States; that he should take care that the laws of the United States be duly and faithfully executed, and that he should commission all the officers of the United States and appoint officers in all cases not otherwise provided by the Constitution. 2 Farrand, 185. The committee further recommended that the Senate be given power to make treaties, and to appoint ambassadors and judges of the Supreme Court.

After the great compromises of the Convention—the one giving the States equality of representation in the

Senate, and the other placing the election of the President, not in Congress as once voted, but in an electoral college, in which the influence of larger States in the selection would be more nearly in proportion to their population—the smaller States, led by Roger Sherman, fearing that under the second compromise the President would constantly be chosen from one of the larger States, secured a change by which the appointment of all officers, which theretofore had been left to the President without restriction, was made subject to the Senate's advice and consent, and the making of treaties and the appointments of ambassadors, public ministers, consuls and judges of the Supreme Court were transferred to the President, but made subject to the advice and consent of the Senate. This third compromise was effected in a special committee, in which Gouverneur Morris of Pennsylvania represented the larger States and Roger Sherman the smaller States. Although adopted finally without objection by any State in the last days of the Convention, members from the larger States, like Wilson and others, criticized this limitation of the President's power of appointment of executive officers and the resulting increase of the power of the Senate. 2 Farrand, 537, 538, 539.

In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the Committee of the Whole that there should be established three executive departments—one of Foreign Affairs, another of the Treasury, and a third of War—at the head of each of which there should be a Secretary, to be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President. The committee agreed to the establishment of a Department of Foreign Affairs, but a discussion ensued as to making the Secretary removable by the President. 1 Annals of Congress, 370, 371. "The question was now taken and carried, by a considerable majority, in favor

of declaring the power of removal to be in the President." 1 Annals of Congress, 383.

On June 16, 1789, the House resolved itself into a Committee of the Whole on a bill proposed by Mr. Madison for establishing an executive department to be denominated the Department of Foreign Affairs, in which the first clause, after stating the title of the officer and describing his duties, had these words: "to be removable from office by the President of the United States." 1 Annals of Congress, 455. After a very full discussion the question was put: shall the words "to be removable by the President" be struck out? It was determined in the negative—yeas 20, nays 34. 1 Annals of Congress, 576.

On June 22, in the renewal of the discussion, "Mr. Benson moved to amend the bill, by altering the second clause, so as to imply the power of removal to be in the President alone. The clause enacted that there should be a chief clerk, to be appointed by the Secretary of Foreign Affairs, and employed as he thought proper, and who, in case of vacancy, should have the charge and custody of all records, books, and papers appertaining to the department. The amendment proposed that the chief clerk, 'whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy,' should during such vacancy, have the charge and custody of all records, books, and papers appertaining to the department." 1 Annals of Congress, 578.

"Mr. Benson stated that his objection to the clause 'to be removable by the President' arose from an idea that the power of removal by the President hereafter might appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was fixed by a fair legislative construction of the Constitution." 1 Annals of Congress, 579.

"Mr. Benson declared, if he succeeded in this amendment, he would move to strike out the words in the first clause, 'to be removable by the President' which appeared somewhat like a grant. Now, the mode he took would evade that point and establish a legislative construction of the Constitution. He also hoped his amendment would succeed in reconciling both sides of the House to the decision, and quieting the minds of gentlemen." 1 Annals of Congress, 578.

Mr. Madison admitted the objection made by the gentleman near him (Mr. Benson) to the words in the bill. He said: "They certainly may be construed to imply a legislative grant of the power. He wished everything like ambiguity expunged, and the sense of the House explicitly declared, and therefore seconded the motion. Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President; and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power, were intended only to throw light upon what was meant by the compilers of the Constitution. Now, as the words proposed by the gentleman from New York expressed to his mind the meaning of the Constitution, he should be in favor of them, and would agree to strike out those agreed to in the committee." 1 Annals of Congress, 578, 579.

Mr. Benson's first amendment to alter the second clause by the insertion of the italicized words, made that clause to read as follows:

"That there shall be in the State Department an inferior officer to be appointed by the said principal officer, and to be employed therein as he shall deem proper, to be called the Chief Clerk in the Department of Foreign Affairs, *and who, whenever the principal officer shall be removed from office by the President of the United States,* or in any other case of vacancy, shall, during such va-

cancy, have charge and custody of all records, books and papers appertaining to said department."

The first amendment was then approved by a vote of thirty to eighteen. 1 Annals of Congress, 580. Mr. Benson then moved to strike out in the first clause the words "to be removable by the President," in pursuance of the purpose he had already declared, and this second motion of his was carried by a vote of thirty-one to nineteen. 1 Annals of Congress, 585.

The bill as amended was ordered to be engrossed, and read the third time the next day, June 24, 1789, and was then passed by a vote of twenty-nine to twenty-two, and the Clerk was directed to carry the bill to the Senate and desire their concurrence. 1 Annals of Congress, 591.

It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson Impeachment trial in 1868, its meaning was not doubted even by those who questioned its soundness.

The discussion was a very full one. Fourteen out of the twenty-nine who voted for the passage of the bill, and eleven of the twenty-two who voted against the bill took part in the discussion. Of the members of the House, eight had been in the Constitutional Convention, and of these, six voted with the majority, and two, Roger Sherman and Eldridge Gerry, the latter of whom had refused to sign the Constitution, voted in the minority. After

the bill as amended had passed the House, it was sent to the Senate, where it was discussed in secret session, without report. The critical vote there was upon the striking out of the clause recognizing and affirming the unrestricted power of the President to remove. The Senate divided by ten to ten, requiring the deciding vote of the Vice-President, John Adams, who voted against striking out, and in favor of the passage of the bill as it had left the House.* Ten of the Senators had been in the Constitutional Convention, and of them six voted that the power of removal was in the President alone. The bill having passed as it came from the House was signed by President Washington and became a law. Act of July 27, 1789, 1 Stat. 28, c. 4.

The bill was discussed in the House at length and with great ability. The report of it in the Annals of Congress is extended. James Madison was then a leader in the House, as he had been in the Convention. His arguments in support of the President's constitutional power of removal independently of Congressional provision, and without the consent of the Senate, were masterly, and he carried the House.

It is convenient in the course of our discussion of this case to review the reasons advanced by Mr. Madison and his associates for their conclusion, supplementing them, so far as may be, by additional considerations which lead this Court to concur therein.

First. Mr. Madison insisted that Article II by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article. He pointed out that one of the chief

* Maclay shows the vote ten to ten. Journal of William Maclay, 116. John Adams' Diary shows nine to nine. 3 C. F. Adams, Works of John Adams, 412. Ellsworth's name appears in Maclay's list as voting against striking out, but not in that of Adams—evidently an inadvertence.

purposes of the Convention was to separate the legislative from the executive functions. He said:

"If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." 1 Annals of Congress, 581.

Their union under the Confederation had not worked well, as the members of the convention knew. Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had their full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56. *Kendall* v. *United States*, 12 Peters 524, 610. Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this Court in *Meriwether* v. *Garrett*, 102 U. S. 472, 515; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *Mugler* v. *Kansas*, 123 U. S. 623, 662.

The debates in the Constitutional Convention indicated an intention to create a strong Executive, and after a controversial discussion the executive power of the Government was vested in one person and many of his important functions were specified so as to avoid the

humiliating weakness of the Congress during the Revolution and under the Articles of Confederation. 1 Farrand, 66–97.

Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing Article II to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the Article to "take care that the laws be faithfully executed." Madison, 1 Annals of Congress, 496, 497.

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. *Wilcox* v. *Jackson,* 13 Peters 498, 513; *United States* v. *Eliason,* 16 Peters 291, 302; *Williams* v. *United States,* 1 How. 290, 297; *Cunningham* v. *Neagle,* 135 U. S. 1, 63; *Russell Co.* v. *United States,* 261 U. S. 514, 523. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly

were not the exercise of legislative or judicial power in government as usually understood.

It is quite true that, in state and colonial governments at the time of the Constitutional Convention, power to make appointments and removals had sometimes been lodged in the legislatures or in the courts, but such a disposition of it was really vesting part of the executive power in another branch of the Government. In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words "executive power" as including both. *Ex Parte Grossman,* 267 U. S. 87, 110. Unlike the power of conquest of the British Crown, considered and rejected as a precedent for us in *Fleming* v. *Page,* 9 How. 603, 618, the association of removal with appointment of executive officers is not incompatible with our republican form of Government.

The requirement of the second section of Article II that the Senate should advise and consent to the Presidential appointments, was to be strictly construed. The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used. Madison, 1 Annals, 462, 463, 464. The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the Executive was convincing indication that none was intended. This is the same construction of Article II as that of Alexander Hamilton quoted *infra.*

Second. The view of Mr. Madison and his associates was that not only did the grant of executive power to the President in the first section of Article II carry with it the power of removal, but the express recognition of the power of appointment in the second section enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. It was agreed by the opponents of the bill, with only one or two exceptions, that as a constitutional principle the power of appointment carried with it the power of removal. Roger Sherman, 1 Annals of Congress, 491. This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since. *Ex parte Hennen,* 13 Peters 230, 259; *Reagan* v. *United States,* 182 U. S. 419; *Shurtleff* v. *United States,* 189 U. S. 311, 315. The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint.

Under section 2 of Article II, however, the power of appointment by the Executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the Government, may check the action of the Executive by rejecting the officers he selects. Does this make the Senate part of the removing power? And this, after the whole discussion in the House is read attentively, is the real point which was considered and decided in the negative by the vote already given.

The history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that it was not prompted by any desire to limit removals. As already pointed out, the important purpose of those who brought about the restriction was to lodge in the Senate, where the small States had equal

representation with the larger States, power to prevent the President from making too many appointments from the larger States. Roger Sherman and Oliver Ellsworth, delegates from Connecticut, reported to its Governor: "The equal representation of the States in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as of the greater States." 3 Farrand, 99. The formidable opposition to the Senate's veto on the President's power of appointment indicated that, in construing its effect, it should not be extended beyond its express application to the matter of appointments. This was made apparent by the remarks of Abraham Baldwin, of Georgia, in the debate in the First Congress. He had been a member of the Constitutional Convention. In opposing the construction which would extend the Senate's power to check appointments to removals from office, he said:

"I am well authorized to say that the mingling of the powers of the President and Senate was strongly opposed in the Convention which had the honor to submit to the consideration of the United States and the different States the present system for the government of the Union. Some gentlemen opposed it to the last, and finally it was the principal ground on which they refused to give it their signature and assent. One gentleman called it a monstrous and unnatural connexion and did not hesitate to affirm it would bring on convulsions in the government. This objection was not confined to the walls of the Convention; it has been subject of newspaper declamation and perhaps justly so. Ought we not, therefore, to be careful not to extend this unchaste connexion any further?" 1 Annals of Congress, 557.

Madison said:

"Perhaps there was no argument urged with more success or more plausibly grounded against the Constitution under which we are now deliberating than that founded

on the mingling of the executive and legislative branches of the Government in one body. It has been objected that the Senate have too much of the executive power even, by having control over the President in the appointment to office. Now shall we extend this connexion between the legislative and executive departments which will strengthen the objection and diminish the responsibility we have in the head of the Executive?" 1 Annals of Congress, 380.

It was pointed out in this great debate that the power of removal, though equally essential to the executive power, is different in its nature from that of appointment. Madison, 1 Annals of Congress, 497, *et seq.;* Clymer, 1 Annals, 489; Sedgwick, 1 Annals, 522; Ames, 1 Annals, 541, 542; Hartley, 1 Annals, 481. A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nomi-

nee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President, are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

Oliver Ellsworth was a member of the Senate of the First Congress, and was active in securing the imposition of the Senate restriction upon appointments by the President. He was the author of the Judiciary Act in that Congress, and subsequently Chief Justice of the United States. His view as to the meaning of this article of the Constitution, upon the point as to whether the advice of the Senate was necessary to removal, like that of Madison, formed and expressed almost in the very atmosphere of the Convention, was entitled to great weight. What he said in the discussion in the Senate was reported by Senator William Patterson, 2 Bancroft, History of the Constitution of the United States, 192, as follows:

"The three distinct powers, legislative, judicial and executive should be placed in different hands. 'He shall take care that the laws be faithfully executed' are sweeping words. The officers should be attentive to the President to whom the Senate is not a council. To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted. The advice of the Senate does not make the appointment. The President appoints. There

are certain restrictions in certain cases, but the restriction is as to the appointment and not as to the removal."

In the discussion in the First Congress fear was expressed that such a constitutional rule of construction as was involved in the passage of the bill would expose the country to tyranny through the abuse of the exercise of the power of removal by the President. Underlying such fears was the fundamental misconception that the President's attitude in his exercise of power is one of opposition to the people, while the Congress is their only defender in the Government, and such a misconception may be noted in the discussions had before this Court. This view was properly contested by Mr. Madison in the discussion (1 Annals of Congress, 461), by Mr. Hartley (1 Annals, 481), by Mr. Lawrence (1 Annals, 485), and by Mr. Scott (1 Annals, 533). The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide; and, as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

Another argument advanced in the First Congress against implying the power of removal in the President alone from its necessity in the proper administration of the executive power, was that all embarrassment in this respect could be avoided by the President's power of suspension of officers, disloyal or incompetent, until the Senate could act. To this, Mr. Benson, said:

"Gentlemen ask, will not the power of suspending an officer be sufficient to prevent mal-conduct? Here is some

inconsistency in their arguments. They declare that Congress have no right to construe the Constitution in favor of the President, with respect to removal; yet they propose to give a construction in favor of the power of suspension being exercised by him. Surely gentlemen do not pretend that the President has the power of suspension granted expressly by the Constitution; if they do, they have been more successful in their researches into that instrument than I have been. If they are willing to allow a power of suspending, it must be because they construe some part of the Constitution in favor of such a grant. The construction in this case must be equally unwarrantable. But admitting it proper to grant this power, what then? When an officer is suspended, does the place become vacant? May the President proceed to fill it up? Or must the public business be likewise suspended? When we say an officer is suspended, it implies that the place is not vacant; but the parties may be heard, and, after the officer is freed from the objections that have been taken to his conduct, he may proceed to execute the duties attached to him. What would be the consequence of this? If the Senate, upon its meeting, were to acquit the officer, and replace him in his station, the President would then have a man forced on him whom he considered as unfaithful; and could not, consistent with his duty; and a proper regard to the general welfare, go so far as to entrust him with full communications relative to the business of his department. Without a confidence in the Executive department, its operations would be subject to perpetual discord, and the administration of the Government become impracticable." 1 Annals of Congress, 506.

Mr. Vining said:

"The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them; but take away his controlling power, and upon what principle do you require his responsibility?

"The gentlemen say the President may suspend. They were asked if the Constitution gave him this power any more than the other? Do they contend the one to be a more inherent power than the other? If they do not, why shall it be objected to us that we are making a Legislative construction of the Constitution, when they are contending for the same thing?" 1 Annals of Congress, 512.

In the case before us, the same suggestion has been made for the same purpose, and we think it is well answered in the foregoing. The implication of removal by the President alone is no more a strained construction of the Constitution than that of suspension by him alone, and the broader power is much more needed and more strongly to be implied.

Third. Another argument urged against the constitutional power of the President alone to remove executive officers appointed by him with the consent of the Senate is that, in the absence of an express power of removal granted to the President, power to make provision for removal of all such officers is vested in the Congress by section 8 of Article I.

Mr. Madison, mistakenly thinking that an argument like this was advanced by Roger Sherman, took it up and answered it as follows:

"He seems to think (if I understand him rightly) that the power of displacing from office is subject to Legislative discretion; because, having a right to create, it may limit or modify as it thinks proper. I shall not say but at first view this doctrine may seem to have some plausibility. But when I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive and Judicial powers of Government; and when I consider that if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle,

exclude the President altogether from exercising any authority in the removal of officers; they may give [it] to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress; or they may reserve it to be exercised by this house. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I can not subscribe to it. . . ." 1 Annals of Congress, 495, 496.

Of the eleven members of the House who spoke from amongst the twenty-two opposing the bill, two insisted that there was no power of removing officers after they had been appointed, except by impeachment, and that the failure of the Constitution expressly to provide another method of removal involved this conclusion. Eight of them argued that the power of removal was in the President and the Senate—that the House had nothing to do with it; and most of these were very insistent upon this view in establishing their contention that it was improper for the House to express in legislation any opinion on the constitutional question whether the President could remove without the Senate's consent.

The constitutional construction that excludes Congress from legislative power to provide for the removal of superior officers finds support in the second section of Article II. By it the appointment of all officers, whether superior or inferior, by the President is declared to be subject to the advice and consent of the Senate. In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal. Whether the Senate must concur in the removal is aside from the point we now are considering. That point is, that by the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the power of appointment and removal is clearly provided for by

the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices in the clause that follows, *viz,* "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." These words, it has been held by this Court, give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them. *United States* v. *Perkins,* 116 U. S. 483, 485. Here, then, is an express provision, introduced in words of exception, for the exercise by Congress of legislative power in the matter of appointments and removals in the case of inferior executive officers. The phrase "But Congress may by law vest" is equivalent to "excepting that Congress may by law vest." By the plainest implication it excludes Congressional dealing with appointments or removals of executive officers not falling within the exception, and leaves unaffected the executive power of the President to appoint and remove them.

A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by Article II, according to its usual definition, and the implication of his power of removal of such officers from the provision of section 2 expressly recognizing in him the power of their appoint-

ment, are a much more natural and appropriate source of the removing power.

It is reasonable to suppose also that, had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article I, or in the specified limitations on the executive power in Article II. The difference between the grant of legislative power under Article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article II, is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended.

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation. As Mr. Madison said in the First Congress:

"The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to con-

sider the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the Government." 1 Annals of Congress, 581, 582.

The legislative power here referred to by Mr. Madison is the legislative power of Congress under the Constitution, not legislative power independently of it. Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation—all except as otherwise provided by the Constitution.

An argument in favor of full Congressional power to make or withhold provision for removals of all appointed by the President is sought to be found in an asserted analogy between such a power in Congress and its power in the establishment of inferior federal courts. By Article III the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish. By section 8 of Article I, also, Congress is given power to constitute tribunals inferior to the Supreme Court. By the second section the judicial power is extended to all cases in law and equity under this Constitution and to a substantial number of other classes of cases. Under the ac-

cepted construction the cases mentioned in this section are treated as a description and reservoir of the judicial power of the United States and a boundary of that federal power as between the United States and the States, and the field of jurisdiction within the limits of which Congress may vest particular jurisdiction in any one inferior federal court which it may constitute. It is clear that the mere establishment of a federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III, but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard; and the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments. It is said that, similarly, in the case of the executive power which is "vested in the President," the power of appointment and removal can not arise until Congress creates the office and its duties and powers, and must accordingly be exercised and limited only as Congress shall in the creation of the office prescribe.

We think there is little or no analogy between the two legislative functions of Congress in the cases suggested. The judicial power described in the second section of Article III is vested in the courts collectively, but is manifestly to be distributed to different courts and conferred or withheld as Congress shall in its discretion provide their respective jurisdictions, and is not all to be vested in one particular court. Any other construction would be impracticable. The duty of Congress, therefore, to make provision for the vesting of the whole federal judicial power in federal courts, were it held to exist, would be one of imperfect obligation and unenforceable. On the other hand, the moment an office and its powers and duties are created, the power of appointment and removal, as limited by the Constitution, vests in the Execu-

tive. The functions of distributing jurisdiction to courts, and the exercise of it when distributed and vested, are not at all parallel to the creation of an office, and the mere right of appointment to, and of removal from, the office, which at once attaches to the Executive by virtue of the Constitution.

Fourth. Mr. Madison and his associates pointed out with great force the unreasonable character of the view that the Convention intended, without express provision, to give to Congress or the Senate, in case of political or other differences, the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible.

As Mr. Madison said in the debate in the First Congress:

"Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Congress, 499.

Mr. Boudinot of New Jersey said upon the same point:

"The supreme Executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they

shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution, to prevent his having officers imposed upon him who do not meet his approbation?" 1 Annals of Congress, 468.

Mr. Sedgwick of Massachusetts asked the question:

"Shall a man under these circumstances be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system." 1 Annals of Congress, 522.

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. But it is contended that executive officers appointed by the President with the consent of the Senate are bound by the statutory law and are not his servants to do his will, and that his obligation to care for the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. *Kendall* v. *United States,* 12

Peters, 524 at p. 610. Each head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority.

The extent of the political responsibility thrust upon the President is brought out by Mr. Justice Miller, speaking for the Court in *Cunningham* v. *Neagle,* 135 U. S. 1 at p. 63:

"The Constitution, section 3, Article 2, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and by and with the advice and consent of the Senate to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'"

He instances executive dealings with foreign governments, as in the case of Martin Koszta, and he might have added the Jonathan Robbins case as argued by John Marshall in Congress, 5 Wheat. Appendix 1, and approved by this Court in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 714. He notes the President's duty as to the protection of the mails, as to which the case of *In re Debs,* 158 U. S. 564, 582–584 affords an illustration. He

instances executive obligation in protection of the public domain, as in *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, and *United States* v. *Hughes*, 11 How. 552. The possible extent of the field of the President's political executive power may be judged by the fact that the quasi-civil governments of Cuba, Porto Rico and the Philippines, in the silence of Congress, had to be carried on for several years solely under his direction as commander in chief.

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described, are the most important in the whole field of executive action of the Government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.

But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but, first, because of our agreement with the reasons upon which it was avowedly based; second, because this was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and, third, because that Congress numbered among its leaders those who had been members of the Convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new Government would be based, and, if erroneous, it would be likely to evoke dissent and departure in future Congresses. It would come at once before the executive branch of the Government for compliance, and might well be brought before the judicial branch for a test of its validity. As, we shall see, it was soon accepted as a final decision of the question by all branches of the Government.

It was of course to be expected that the decision would be received by lawyers and jurists with something of the same division of opinion as that manifested in Congress, and doubts were often expressed as to its correctness. But the acquiescence which was promptly accorded it after a few years was universally recognized.

A typical case of such acquiescence was that of Alexander Hamilton. In the discussion in the House of Representatives in 1789, Mr. White and others cited the opinion of Mr. Hamilton in respect of the necessity for the consent of the Senate to removals by the President, before they should be effective. (1 Annals, First Congress, 456.) It was expressed in No. 77 of the Federalist, as follows:

"It has been mentioned as one of the advantages to be expected from the co-operation of the Senate in the business of appointments, that it would contribute to the stability of the Administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the Government as might be expected if he were the sole disposer of offices."

Hamilton changed his view of this matter during his incumbency as Secretary of the Treasury in Washington's Cabinet, as is shown by his view of Washington's first proclamation of neutrality in the war between France and Great Britain. That proclamation was at first criticized as an abuse of executive authority. It has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration, and has been often followed by succeeding Presidents. Hamilton's argument was that the Constitution, by vesting the executive power in the President, gave him the right, as the organ of intercourse between the Nation and foreign nations, to interpret national treaties and to declare neutrality. He deduced this from Article II of the Constitution on the executive power, and followed exactly the reasoning of Madison and his associates as to the executive power upon which the legislative decision of the First Congress as to Presidential removals depends, and he cites it as authority. He said:

"The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America.'

"The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the President shall be commander in chief of the army and navy of the United

States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the Senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.*

"It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the Senate in the appointment of officers and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are 'All legislative powers herein granted shall be vested in a congress of the United States.' In that which grants the executive power, the expressions are '*The executive power* shall be vested in a President of the United States.'

"The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.

"The general doctrine of our Constitution then is, that the executive power of the nation is vested in the Presi-

dent; subject only to the exceptions and qualifications, which are expressed in the instrument.

"Two of these have already been noticed; the participation of the Senate in the appointment of officers, and in the making of treaties. A third remains to be mentioned; the right of the legislature to 'declare war and grant letters of marque and reprisal.'

"With these exceptions, the executive power of the United States is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts upon full consideration and debate; of which the power of removal from office is an important instance. It will follow that if a proclamation of neutrality is merely an executive act, as it is believed, has been shown, the step which has been taken by the President is liable to no just exception on the score of authority." 7 J. C. Hamilton's "Works of Hamilton," 80–81.

The words of a second great constitutional authority, quoted as in conflict with the Congressional decision, are those of Chief Justice Marshall. They were used by him in his opinion in *Marbury* v. *Madison,* 1 Cranch, 137 (1803). The judgment in that case is one of the great landmarks in the history of the construction of the Constitution of the United States, and is of supreme authority, first, in respect of the power and duty of the Supreme Court and other courts to consider and pass upon the validity of acts of Congress enacted in violation of the limitations of the Constitution, when properly brought before them in cases in which the rights of the litigating parties require such consideration and decision, and, second, in respect of the lack of power of Congress to vest in the Supreme Court original jurisdiction to grant the remedy of mandamus in cases in which by the Constitution it is given only appellate jurisdiction. But it is not to be regarded as such authority in respect of the

power of the President to remove officials appointed by the advice and consent of the Senate, for that question was not before the Court.

The case was heard upon a rule served upon James Madison, Secretary of State, to show cause why a writ of mandamus should not issue directing the defendant, Madison, to deliver to William Marbury his commission as a justice of the peace for the County of Washington in the District of Columbia. The rule was discharged by the Supreme Court for the reason that the Court had no jurisdiction in such a case to issue a writ for mandamus.

The Court had, therefore, nothing before it calling for a judgment upon the merits of the question of issuing the mandamus. Notwithstanding this, the opinion considered preliminarily, first, whether the relator had the right to the delivery of the commission, and, second, whether it was the duty of the Secretary of State to deliver it to him, and a duty which could be enforced in a court of competent jurisdiction at common law by a writ of mandamus. The facts disclosed by affidavits filed were, that President Adams had nominated Marbury to be a justice of the peace in the District of Columbia, under a law of Congress providing for such appointment, by and with the advice and consent of the Senate, for the term of five years, and that the Senate had consented to such an appointment; that the President had signed the commission as provided by the Constitution, and had transmitted it to the Secretary of State, who, as provided by statute, had impressed the seal of the United States thereon. The opinion of the Chief Justice on these questions was, that the commission was only evidence of the appointment; that, upon delivery of the signed commission by the President to the Secretary of State, the office was filled and the occupant was thereafter entitled to the evidence of his appointment in the form of the commission; that the duty of the Secretary in delivering the commission to the officer entitled

was merely ministerial and could be enforced by mandamus; that the function of the Secretary in this regard was entirely to be distinguished from his duty as a subordinate to the President in the discharge of the President's political duties which could not be controlled.

It would seem that this conclusion applied, under the reasoning of the opinion, whether the officer was removable by the President or not, if in fact the President had not removed him. But the opinion assumed that, in the case of a removable office, the writ would fail, on the presumption that there was in such a case discretion of the appointing power to withhold the commission. And so the Chief Justice proceeded to express an opinion on the question whether the appointee was removable by the President. He said: "As the law creating the office, gave the officer a right to hold it for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country."

There was no answer by Madison to the rule issued in the case. The case went by default. It did not appear, even by avowed opposition to the issue of the writ, that the President had intervened in the matter at all. It would seem to have been quite consistent with the case as shown that this was merely an arbitrary refusal by the Secretary to perform his ministerial function, and, therefore, that the expression of opinion that the officer was not removable by the President was unnecessary, even to the conclusion that a writ in a proper case could issue. However this may be, the whole statement was certainly *obiter dictum* with reference to the judgment actually reached. The question whether the officer was removable was not argued to the Court by any counsel contending for that view. Counsel for the relator, who made the only argument, contended that the officer was not removable by the President, because he held a judicial office and

under the Constitution could not be deprived of his office for the five years of his term by Presidential action. The opinion contains no wider discussion of the question than that quoted above.

While everything that the great Chief Justice said, whether *obiter dictum* or not, challenges the highest and most respectful consideration, it is clear that the mere statement of the conclusion made by him, without any examination of the discussion which went on in the First Congress, and without reference to the elaborate arguments there advanced to maintain the decision of 1789, can not be regarded as authority in considering the weight to be attached to that decision—a decision, which as we shall see, he subsequently recognized as a well-established rule of constitutional construction.

In such a case we may well recur to the Chief Justice's own language in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, in which, in declining to yield to the force of his previous language in *Marbury* v. *Madison,* which was unnecessary to the judgment in that case and was *obiter dictum,* he said:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The weight of this dictum of the Chief Justice as to a Presidential removal, in *Marbury* v. *Madison,* was considered by this Court in *Parsons* v. *United States,* 167

U. S. 324. It was a suit by Parsons against the United States for the payment of the balance due for his salary and fees as United States District Attorney for Alabama. He had been commissioned as such, under the statute, for the term of four years from the date of the commission, subject to the conditions prescribed by law. There was no express power of removal provided. Before the end of the four years he was removed by the President. He was denied recovery.

The language of the Court in *Marbury* v. *Madison,* already referred to, was pressed upon this Court to show that Parsons was entitled, against the Presidential action of removal, to continue in office. If it was authoritative and stated the law as to an executive office, it ended the case; but this Court did not recognize it as such, for the reason that the Chief Justice's language relied on was not germane to the point decided in *Marbury* v. *Madison.* If his language was more than a dictum, and was a decision, then the *Parson's* case overrules it.

Another distinction, suggested by Mr. Justice Peckham in *Parson's* case was that the remarks of the Chief Justice were in reference to an office in the District of Columbia, over which, by Art. I, sec. 8, subd. 17, Congress had exclusive jurisdiction in all cases, and might not apply to offices outside of the District in respect to which the constant practice and the Congressional decision had been the other way (p. 335). How much weight should be given to this distinction, which might accord to the special exclusive jurisdiction conferred on Congress over the District power to ignore the usual constitutional separation between the executive and legislative branches of the Government, we need not consider.

If the Chief Justice, in *Marbury* v. *Madison,* intended to express an opinion for the Court inconsistent with the legislative decision of 1789, it is enough to observe that he changed his mind; for otherwise it is inconceivable that

he should have written and printed his full account of the discussion and decision in the First Congress and his acquiescence in it, to be found in his Life of Washington (Vol. V, pages 192–200).

He concluded his account as follows:

"After an ardent discussion which consumed several days, the committee divided; and the amendment [i. e. to strike out from the original bill the words 'to be removable by the President'] was negatived by a majority of thirty-four to twenty. The opinion thus expressed by the house of representatives did not explicitly convey their sense of the Constitution. Indeed the express grant of the power to the president, rather implied a right in the legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson [later] moved in the house, when the report of the committee of the whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal to be solely in the president. He gave notice that if he should succeed in this, he would move to strike out the words which had been the subject of debate. If those words continued, he said the power of removal by the president might hereafter appear to be exercised by virtue of a legislative grant only and consequently be subjected to legislative instability; when he was well satisfied in his own mind, that it was by fair construction, fixed in the constitution. The motion was seconded by Mr. Madison, and both amendments were adopted. As the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the American constitution."

This language was first published in 1807, four years after the judgment in *Marbury* v. *Madison,* and the edition was revised by the Chief Justice in 1832. 3 Beveridge, Life of Marshall, 248, 252, 272, 273.

Congress, in a number of acts, followed and enforced the legislative decision of 1789 for seventy-four years. In the act of the First Congress, which adapted to the Constitution the ordinance of 1787 for the government of the Northwest Territory, which had provided for the appointment and removal of executive territorial officers by the Congress under the Articles of Confederation, it was said "in all cases where the United States in Congress assembled, might, by the said ordinance revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal." 1 Stat. 53, c. 8. This was approved eleven days after the act establishing the Department of Foreign Affairs, and was evidently in form a declaration in accord with the legislative constitutional construction of the latter act. In the provision for the Treasury and War Departments, the same formula was used as occurred in the act creating the Department of Foreign Affairs; but it was omitted from other creative acts only because the decision was thought to be settled constitutional construction. *In re Hennen,* 13 Peters 230, 259.

Occasionally we find that Congress thought it wiser to make express what would have been understood. Thus, in the Judiciary Act of 1789, we find it provided in § 27, 1 Stat. 87, c. 20, "that a marshal shall be appointed in and for each district for the term of four years, but shall be removable at pleasure, whose duty it shall be to attend the District and Circuit Courts." That act became a law on September 24th, a month after the Congressional debate on removals. It was formulated by a Senate committee, of which Oliver Ellsworth was chairman, and which presumably was engaged in drafting it during the time of that debate. Section 35 of the same act provided for the appointment of an attorney for the United States to prosecute crimes and conduct civil actions on behalf of

the United States, but nothing was said as to his term of office or as to his removal. The difference in the two cases was evidently to avoid any inference from the fixing of the term that a conflict with the legislative decision of 1789 was intended.

In the Act of May 15, 1820, 3 Stat. 582, c. 102, Congress provided that thereafter all district attorneys, collectors of customs, naval officers, surveyors of the customs, navy agents, receivers of public moneys for land, registers of the land office, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases, to be appointed under the laws of the United States, should be appointed for the term of four years, but should be removable from office at pleasure.

It is argued that these express provisions for removal at pleasure indicate that, without them, no such power would exist in the President. We can not accede to this view. Indeed, the conclusion that they were adopted to show conformity to the legislative decision of 1789 is authoritatively settled by a specific decision of this Court.

In the *Parsons* case, 167 U. S. 324, already referred to, the exact question which the Court had to decide was whether under § 769 of the Revised Statutes, providing that district attorneys should be appointed for a term of four years and their commissions should cease and expire at the expiration of four years from their respective dates, the appellant, having been removed by the President from his office as district attorney before the end of his term, could recover his salary for the remainder of the term. If the President had no power of removal, then he could recover. The Court held that under that section the President did have the power of removal, because of the derivation of the section from the Act of 1820, above quoted. In § 769 the specific provision of the Act of 1820 that the officers should be removable

from office at pleasure was omitted. This Court held that the section should be construed as having been passed in the light of the acquiescence of Congress in the decision of 1789, and therefore included the power of removal by the President, even though the clause for removal was omitted. This reasoning was essential to the conclusion reached and makes the construction by this Court of the Act of 1820 authoritative. The Court used, in respect of the Act of 1820, this language (167 U. S. 324, 339):

"The provision for a removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was then regarded as being clothed with such power in any event. Considering the construction of the Constitution in this regard as given by the Congress of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction, we must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time, and we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove."

In the Act of July 17, 1862, 12 Stat. 596, c. 200, Congress actually requested the President to make removals in the following language:

"the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service."

Attorney General Devens (15 Op. A. G. 421) said of this act that, so far as it gave authority to the President,

it was simply declaratory of the long-established law; that the force of the act was to be found in the word "requested," by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis of the state—a comment by the Attorney General which was expressly approved by this Court in *Blake* v. *United States,* 103 U. S. 227, 234.

The acquiescence in the legislative decision of 1789 for nearly three-quarters of a century by all branches of the Government has been affirmed by this Court in unmistakable terms. In *Parsons* v. *United States,* already cited, in which the matter of the power of removal was reviewed at length in connection with that legislative decision, this Court, speaking by Mr. Justice Peckham, said (page 330):

"Many distinguished lawyers originally had very different opinions in regard to this power from the one arrived at by this Congress, but when the question was alluded to in after years they recognized that the decision of Congress in 1789 and the universal practice of the Government under it, had settled the question beyond any power of alteration."

We find this confirmed by Chancellor Kent's and Mr. Justice Story's comments. Chancellor Kent, in writing to Mr. Webster in January, 1830, concerning the decision of 1789, said:

"I heard the question debated in the summer of 1789, and Madison, Benson, Ames, Lawrence, etc. were in favor of the right of removal by the President, and such has been the opinion ever since and the practice. I thought they were right because I then thought this side uniformly right."

Then, expressing subsequent pause and doubt upon this construction as an original question because of Hamilton's original opinion in The Federalist, already referred to, he continued:

"On the other hand, it is too late to call the President's power in question after a declaratory act of Congress and

an acquiescence of half a century. We should hurt the reputation of our government with the world, and we are accused already of the Republican tendency of reducing all executive power into the legislative, and making Congress a national convention. That the President grossly abuses the power of removal is manifest, but it is the evil genius of Democracy to be the sport of factions." 1 Private Correspondence of Daniel Webster, Fletcher Webster ed., 486; 1903 National ed., Little Brown Co.

In his Commentaries, referring to this question, the Chancellor said:

"This question has never been made the subject of judicial discussion; and the construction given to the Constitution in 1789 has continued to rest on this loose, incidental, declaratory opinion of Congress, and the sense and practice of government since that time. It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction." 1 Kent Commentaries, Lecture 14, p. 310, Subject, Marshals.

Mr. Justice Story, after a very full discussion of the decision of 1789, in which he intimates that as an original question he would favor the view of the minority, says:

"That the final decision of this question so made was greatly influenced by the exalted character of the President then in office, was asserted at the time, and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in this decision; and it constitutes, perhaps, the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions. Even the most jealous advocates of state rights seem to have slumbered over this vast reach of authority; and have left it untouched, as the neutral ground of controversy, in which they de-

sired to reap no harvest, and from which they retired, without leaving any protestations of title or contest. Nor is this general acquiescence and silence without a satisfactory explanation." 2 Story, Constitution, § 1543.

He finds that, until a then very recent period, namely the Administration of President Jackson, the power of unrestricted removal had been exercised by all the Presidents, but that moderation and forbearance had been shown, that under President Jackson, however, an opposite course had been pursued extensively and brought again the executive power of removal to a severe scrutiny. The learned author then says:

"If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to 'inferior officers' (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases." 2 Story Constitution, § 1544.

In an article by Mr. Fish contained in the American Historical Association Reports, 1899, p. 67, removals from office, not including Presidential removals in the Army and the Navy, in the administrations from Washington to Johnson, are stated to have been as follows: Washington 17; Adams 19; Jefferson 62; Madison 24; Jackson 180; Van Buren 43; Harrison and Tyler 389; Polk 228; Taylor 491; Fillmore 73; Pierce 771; Buchanan 253; Lincoln 1400; Johnson 726. These, we may infer, were all made in conformity to the legislative decision of 1789.

Mr. Webster is cited as opposed to the decision of the First Congress. His views were evoked by the contro-

versy between the Senate and President Jackson. The alleged general use of patronage for political purposes by the President, and his dismissal of Duane, Secretary of the Treasury, without reference to the Senate, upon Duane's refusal to remove government deposits from the United States Bank, awakened bitter criticism in the Senate, and led to an extended discussion of the power of removal by the President. In a speech, May 7, 1834, on the President's protest, Mr. Webster asserted that the power of removal, without the consent of the Senate, was in the President alone, according to the established construction of the Constitution, and that Duane's dismissal could not be justly said to be a usurpation. 4 Webster, Works, 103–105. A year later, in February, 1835, Mr. Webster seems to have changed his views somewhat, and in support of a bill requiring the President in making his removals from office to send to the Senate his reasons therefor, made an extended argument against the correctness of the decision of 1789. He closed his speech thus: "But I think the decision of 1789 has been established by practice, and recognized by subsequent laws, as the settled construction of the Constitution, and that it is our duty to act upon the case accordingly for the present; without admitting that Congress may not, hereafter, if necessity shall require it, reverse the decision of 1789." 4 Webster, 179, 198. Mr. Webster denied that the vesting of the executive power in the President was a grant of power. It amounted, he said, to no more than merely naming the department. Such a construction, although having the support of as great an expounder of the Constitution as Mr. Webster, is not in accord with the usual canon of interpretation of that instrument, which requires that real effect should be given to all the words it uses. *Prout* v. *Starr,* 188 U. S. 537, 544; *Hurtado* v. *California,* 110 U. S. 516, 534; *Prigg* v. *Pennsylvania,* 16 Pet. 539, 612; *Holmes* v. *Jennison,*

14 Pet. 540, 570–571; *Cohens* v. *Virginia,* 6 Wheat. 264, 398; *Marbury* v. *Madison, supra,* at p. 174. Nor can we concur in Mr. Webster's apparent view that when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may by its mere subsequent legislation reverse such construction. It is not given power by itself thus to amend the Constitution. It is not unjust to note that Mr. Webster's final conclusion on this head was reached after pronounced political controversy with General Jackson, which he concedes may have affected his judgment and attitude on the subject.

Mr. Clay and Mr. Calhoun, acting upon a like impulse, also vigorously attacked the decision; but no legislation of any kind was adopted in that period to reverse the established constitutional construction, while its correctness was vigorously asserted and acted on by the Executive. On February 10, 1835, President Jackson declined to comply with the Senate resolution, regarding the charges which caused the removal of officials from office, saying:

"The President in cases of this nature possesses the exclusive power of removal from office, and, under the sanctions of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require. If, on the other hand, from corrupt motives he abuses this power, he is exposed to the same responsibilities. On no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution." 3 Messages of the Presidents, 1352.

In *Ex parte Hennen,* 13 Peters 230, decided by this Court in 1839, the prevailing effect of the legislative decision of 1789 was fully recognized. The question there

was of the legality of the removal from office by a United States District Court of its clerk, appointed by it under § 7 of the Judiciary Act, 1 Stat. 76, c. 20. The case was ably argued and the effect of the legislative decision of the First Congress was much discussed. The Court said (pp. 258–259):

"The Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. It provides that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerks. . . . It can not, for a moment, be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate, jointly to remove, where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution. For in the organization of the three great

departments of State, War and Treasury, in the year 1789, provision is made for the appointment of a subordinate officer by the head of the department, who should have the charge and custody of the records, books, and papers appertaining to the office, when the head of the department should be removed from the office by the President of the United States. (1 Story, 5. 31, 47.) When the Navy Department was established in the year 1798 (1 Story, 498), provision is made for the charge and custody of the books, records, and documents of the department, in case of vacancy in the office of secretary, by removal or otherwise. It is not here said, by removal by the President, as is done with respect to the heads of the other departments; and yet there can be no doubt that he holds his office by the same tenure as the other secretaries, and is removable by the President. The change of phraseology arose, probably, from its having become the settled and well understood construction of the Constitution that the power of removal was vested in the President alone, in such cases, although the appointment of the officer was by the President and Senate."

The legislative decision of 1789 and this Court's recognition of it were followed, in 1842, by Attorney General Legare, in the Administration of President Tyler (4 Op. A. G. 1); in 1847, by Attorney General Clifford, in the Administration of President Polk (4 Op. A. G. 603); by Attorney General Crittenden, in the Administration of President Fillmore (5 Op. A. G. 288, 290); by Attorney General Cushing, in the Administration of President Buchanan (6 Op. A. G. 4); all of whom delivered opinions of a similar tenor.

It has been sought to make an argument, refuting our conclusion as to the President's power of removal of executive officers, by reference to the statutes passed and practice prevailing from 1789 until recent years in respect of the removal of judges, whose tenure is not fixed by

Article III of the Constitution, and who are not strictly United States Judges under that article. The argument is that, as there is no express constitutional restriction as to the removal of such judges, they come within the same class as executive officers, and that statutes and practice in respect of them may properly be used to refute the authority of the legislative decision of 1789 and acquiescence therein.

The fact seems to be that judicial removals were not considered in the discussion in the First Congress, and that the First Congress, August 7, 1789, 1 Stat. 50–53, c. 8, and succeeding Congresses until 1804, assimilated the judges appointed for the territories to those appointed under Article III, and provided life tenure for them, while other officers of those territories were appointed for a term of years unless sooner removed. See as to such legislation dissenting opinion of Mr. Justice McLean in *United States* v. *Guthrie,* 17 How. 284, 308. In *American Insurance Company* v. *Canter,* 1 Peters 511 (1828), it was held that the territorial courts were not constitutional courts in which the judicial power conferred by the Constitution on the general government could be deposited. After some ten or fifteen years, the judges in some territories were appointed for a term of years, and the Governor and other officers were appointed for a term of years unless sooner removed. In Missouri and Arkansas only were the judges appointed for four years if not sooner removed.

After 1804, removals were made by the President of territorial judges appointed for terms of years, before the ends of their terms. They were sometimes suspended and sometimes removed. Between 1804 and 1867, there were ten removals of such judges in Minnesota, Utah, Washington, Oregon and Nebraska. The executive department seemed then to consider that territorial judges were subject to removal just as if they had been executive

officers, under the legislative decision of 1789. Such was the opinion of Attorney General Crittenden on the question of the removal of the Chief Justice of Minnesota Territory (5 Op. A. G. 288) in 1851. Since 1867, territorial judges have been removed by the President, seven in Arizona, one in Hawaii, one in Indian Territory, two in Idaho, three in New Mexico, two in Utah, one in Wyoming.

The question of the President's power to remove such a judge, as viewed by Mr. Crittenden, came before this Court in *United States* v. *Guthrie,* 17 How. 284. The relator Goodrich, who had been removed by the President from his office as a territorial judge, sought by mandamus to compel the Secretary of the Treasury to draw his warrant for the relator's salary for the remainder of his term after removal, and contested the Attorney General's opinion that the President's removal in such a case was valid. This Court did not decide this issue, but held that it had no power to issue a writ of mandamus in such a case. Mr. Justice McLean delivered a dissenting opinion (at page 308). He differed from the Court in its holding that mandamus would not issue. He expressed a doubt as to the correctness of the legislative decision of the First Congress as to the power of removal by the President alone of executive officers appointed by him with the consent of the Senate, but admitted that the decision as to them had been so acquiesced in, and the practice had so conformed to it, that it could not be set aside. But he insisted that the statutes and practice which had governed the appointment and removal of territorial judges did not come within the scope and effect of the legislative decision of 1789. He pointed out that the argument upon which the decision rested was based on the necessity for Presidential removals in the discharge by the President of his executive duties and his taking care that the laws be faithfully executed, and that such an argument could not

apply to the judges over whose judicial duties he could not properly exercise any supervision or control after their appointment and confirmation.

In the case of *McAllister* v. *United States*, 141 U. S. 174, a judge of the District Court of Alaska, it was held, could be deprived of a right to salary as such by his suspension under Revised Statutes 1768. That section gave the President in his discretion authority to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of such suspended officer. It was held that the words "except judges of the courts of the United States" applied to judges appointed under Article III and did not apply to territorial judges, and that the President under § 1768 had power to suspend a territorial judge during a recess of the Senate, and no recovery could be had for salary during that suspended period. Mr. Justice Field, with Justices Gray and Brown, dissented on the ground that in England by the act of 13th William III, it had become established law that judges should hold their offices independent of executive removal, and that our Constitution expressly makes such limitation as to the only judges specifically mentioned in it and should be construed to carry such limitation as to other judges appointed under its provisions.

Referring in *Parsons* v. *United States*, 167 U. S. 324, at p. 337, to the *McAllister* case, this Court said:

"The case contains nothing in opposition to the contention as to the practical construction that had been given to the Constitution by Congress in 1789, and by the government generally since that time and up to the Act of 1867."

The questions, first, whether a judge appointed by the President with the consent of the Senate under an act of

Congress, not under authority of Article III of the Constitution, can be removed by the President alone without the consent of the Senate, second, whether the legislative decision of 1789 covers such a case, and third, whether Congress may provide for his removal in some other way, present considerations different from those which apply in the removal of executive officers, and therefore we do not decide them.

We come now to consider an argument advanced and strongly pressed on behalf of the complainant, that this case concerns only the removal of a postmaster; that a postmaster is an inferior officer; that such an office was not included within the legislative decision of 1789, which related only to superior officers to be appointed by the President by and with the advice and consent of the Senate. This, it is said, is the distinction which Chief Justice Marshall had in mind in *Marbury* v. *Madison,* in the language already discussed in respect of the President's power to remove a District of Columbia justice of the peace appointed and confirmed for a term of years. We find nothing in *Marbury* v. *Madison* to indicate any such distinction. It can not be certainly affirmed whether the conclusion there stated was based on a dissent from the legislative decision of 1789, or on the fact that the office was created under the special power of Congress exclusively to legislate for the District of Columbia, or on the fact that the office was a judicial one or on the circumstance that it was an inferior office. In view of the doubt as to what was really the basis of the remarks relied on, and their *obiter dictum* character, they can certainly not be used to give weight to the argument that the 1789 decision only related to superior officers.

The very heated discussions during General Jackson's Administration, except as to the removal of Secretary Duane, related to the distribution of offices which were, most of them, inferior offices, and it was the operation of

the legislative decision of 1789 upon the power of removal of incumbents of such offices that led the General to refuse to comply with the request of the Senate that he give his reasons for the removals therefrom. It was to such inferior officers that Chancellor Kent's letter to Mr. Webster, already quoted, was chiefly directed; and the language cited from his Commentaries on the decision of 1789 was used with reference to the removal of United States marshals. It was such inferior offices that Mr. Justice Story conceded to be covered by the legislative decision, in his Treatise on the Constitution, already cited, when he suggested a method by which the abuse of patronage in such offices might be avoided. It was with reference to removals from such inferior offices that the already cited opinions of the Attorneys General, in which the legislative decision of 1789 was referred to as controlling authority, were delivered. That of Attorney General Legare (4 Op. A. G. 1) affected the removal of a surgeon in the Navy. The opinion of Attorney General Clifford (4 Op. A. G. 603, 612) involved an officer of the same rank. The opinion of Attorney General Cushing (6 Op. A. G. 4) covered the office of military storekeeper. Finally, *Parson's* case, where it was the point in judgment, conclusively establishes for this Court that the legislative decision of 1789 applied to a United States attorney, an inferior officer.

It is further pressed on us that, even though the legislative decision of 1789 included inferior officers, yet under the legislative power given Congress with respect to such officers, it might directly legislate as to the method of their removal without changing their method of appointment by the President with the consent of the Senate. We do not think the language of the Constitution justifies such a contention.

Section 2 of Article II, after providing that the President shall nominate and with the consent of the Senate

appoint ambassadors, other public ministers, consuls, judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law, contains the proviso "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law or in the heads of departments." In *United States* v. *Perkins*, 116 U. S. 483, a cadet engineer, a graduate of the Naval Academy, brought suit to recover his salary for the period after his removal by the Secretary of the Navy. It was decided that his right was established by Revised Statutes 1229, providing that no officer in the military or naval service should in time of peace be dismissed from service, except in pursuance of a sentence of court-martial. The section was claimed to be an infringement upon the constitutional prerogative of the Executive. The Court of Claims refused to yield to this argument and said:

"Whether or not Congress can restrict the power of removal incident to the power of appointment to those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution, Article 2, Section 2, does not arise in this case, and need not be considered. We have no doubt that when Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

This language of the Court of Claims was approved by this Court and the judgment was affirmed.

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.

Assuming then the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering.

Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would

make his power of removal in such case any more subject to Congressional legislation than before is a question this Court did not decide in the *Perkins* case. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.

The *Perkins* case is limited to the vesting by Congress of the appointment of an inferior officer in the head of a department. The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition. If it does not choose to entrust the appointment of such inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal. That is the reason why the suggestion of Mr. Justice Story, relied upon in this discussion, can not be supported, if it is to have the construction which is contended for. He says that, in regard to inferior officers under the legislative decision of 1789, " the remedy for any permanent abuse (i. e. of executive patronage) is still within the power of Congress by the simple expedient of requiring the consent of the Senate to removals in such cases." It is true that the remedy for the evil of political executive removals of inferior offices is with Congress by a simple expedient, but it includes a change of the power of appointment from the President with the consent of the Senate. Congress must determine first that the office is inferior, and second that it is willing that the office shall be filled by appointment by some other authority than the President with the consent of the Senate. That the latter may be an important consideration is manifest, and is the subject of comment by this Court in its opinion in the case of *Shurtleff* v. *United States,* 189 U. S. 311, 315, where this Court said:

"To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication. Congress has regarded the office as of sufficient importance to make it proper to fill it by appointment to be made by the President and confirmed by the Senate. It has thereby classed it as appropriately coming under the direct supervision of the President and to be administered by officers appointed by him (and confirmed by the Senate) with reference to his constitutional responsibility to see that the laws are faithfully executed. Art. 2, sec. 3."

It is said that, for forty years or more, postmasters were all by law appointed by the Postmaster General. This was because Congress under the excepting clause so provided. But thereafter Congress required certain classes of them to be, as they now are, appointed by the President with the consent of the Senate. This is an indication that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare, and, until it is willing to vest their appointment in the head of the Department, they will be subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution.

Summing up, then, the facts as to acquiescence by all branches of the Government in the legislative decision of 1789, as to executive officers, whether superior or inferior, we find that from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but there was, as we have seen, clear, affirmative recognition of it by each branch of the Government.

Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the Presi-

dent the executive power of the Government, i. e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.

We come now to a period in the history of the Government when both Houses of Congress attempted to reverse this constitutional construction and to subject the power of removing executive officers appointed by the President and confirmed by the Senate to the control of the Senate—indeed, finally, to the assumed power in Congress to place the removal of such officers anywhere in the Government.

This reversal grew out of the serious political difference between the two Houses of Congress and President John-

son. There was a two-thirds majority of the Republican party in control of each House of Congress, which resented what it feared would be Mr. Johnson's obstructive course in the enforcement of the reconstruction measures, in respect of the States whose people had lately been at war against the National Government. This led the two Houses to enact legislation to curtail the then acknowledged powers of the President. It is true that, during the latter part of Mr. Lincoln's term, two important, voluminous acts were passed, each containing a section which seemed inconsistent with the legislative decision of 1789, (Act of February 25, 1863, 12 Stat. 665, c. 58, § 1, Act of March 3, 1865, 13 Stat. 489, c. 79, § 12); but they were adopted without discussion of the inconsistency and were not tested by executive or judicial inquiry. The real challenge to the decision of 1789 was begun by the Act of July 13, 1866, 14 Stat. 92, c. 176, forbidding dismissals of Army and Navy officers in time of peace without a sentence by court-martial, which this Court, in *Blake* v. *United States,* 103 U. S. 227, at p. 235, attributed to the growing differences between President Johnson and Congress.

Another measure having the same origin and purpose was a rider on an army appropriation act of March 2, 1867, 14 Stat. 487, c. 170, § 2, which fixed the headquarters of the General of the Army of the United States at Washington, directed that all orders relating to military operations by the President or Secretary of War should be issued through the General of the Army, who should not be removed, suspended, or relieved from command, or assigned to duty elsewhere, except at his own request, without the previous approval of the Senate; and that any orders or instructions relating to military operations issued contrary to this should be void; and that any officer of the Army who should issue, knowingly transmit, or obey any orders issued contrary to the provisions of

this section, should be liable to imprisonment for years. By the Act of March 27, 1868, 15 Stat. 44, c. 34, § 2, the next Congress repealed a statutory provision as to appeals in *habeas corpus* cases, with the design, as was avowed by Mr. Schenck, chairman of the House Committee on Ways and Means, of preventing this Court from passing on the validity of reconstruction legislation. 81 Congressional Globe, pages 1881, 1883; *Ex parte McArdle*, 7 Wall. 506.

But the chief legislation in support of the reconstruction policy of Congress was the Tenure of Office Act, of March 2, 1867, 14 Stat. 430, c. 154, providing that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appointed and qualified, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President by whom appointed and one month thereafter subject to removal by consent of the Senate. The Tenure of Office Act was vetoed, but it was passed over the veto. The House of Representatives preferred articles of impeachment against President Johnson for refusal to comply with, and for conspiracy to defeat, the legislation above referred to, but he was acquitted for lack of a two-thirds vote for conviction in the Senate.

In *Parsons* v. *United States*, *supra*, the Court thus refers to the passage of the Tenure of Office Act (p. 340):

"The President, as is well known, vetoed the tenure of office act, because he said it was unconstitutional in that it assumed to take away the power of removal constitutionally vested in the President of the United States—a power which had been uniformly exercised by the Executive Department of the Government from its foundation. Upon the return of the bill to Congress it was passed over the President's veto by both houses and became a law. The continued and uninterrupted practice of the

Government from 1789 was thus broken in upon and changed by the passage of this act, so that, if constitutional, thereafter all executive officers whose appointments had been made with the advice and consent of the Senate could not be removed by the President without the concurrence of the Senate in such order of removal.

"Mr. Blaine, who was in Congress at the time, in afterwards speaking of this bill, said: 'It was an extreme proposition—a new departure from the long-established usage of the Federal Government—and for that reason, if for no other, personally degrading to the incumbent of the Presidential chair. It could only have grown out of abnormal excitement created by dissensions between the two great departments of the Government. . . . The measure was resorted to as one of self-defense against the alleged aggressions and unrestrained power of the executive department.' Twenty Years of Congress, vol. 2, 273, 274."

The extreme provisions of all this legislation were a full justification for the considerations so strongly advanced by Mr. Madison and his associates in the First Congress for insisting that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies. It exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm and destroy the principle of executive responsibility and separation of the powers, sought for by the framers of our Government, if the President had no power of removal save by consent of the Senate. It was an attempt to re-distribute the powers and minimize those of the President.

After President Johnson's term ended, the injury and invalidity of the Tenure of Office Act in its radical innovation were immediately recognized by the Executive and objected to. General Grant, succeeding Mr. Johnson

in the Presidency, earnestly recommended in his first message the total repeal of the act, saying:

"It may be well to mention here the embarrassment possible to arise from leaving on the statute books the so-called 'tenure-of-office acts,' and to earnestly recommend their total repeal. It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment, against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government. What faith can an Executive put in officials forced upon him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an Administration which they know does not trust them?" 9 Messages and papers of the Presidents, 3992.

While, in response to this, a bill for repeal of that act passed the House, it failed in the Senate, and, though the law was changed, it still limited the Presidential power of removal. The feeling growing out of the controversy with President Johnson retained the act on the statute book until 1887, when it was repealed. 24 Stat. 500, c. 353. During this interval, on June 8, 1872, Congress passed an act reorganizing and consolidating the Post Office Department, and provided that the Postmaster General and his three assistants should be appointed by the President by and with the advice and consent of the Senate and might be removed in the same manner. 17 Stat. 284, c. 335, § 2. In 1876 the act here under discussion was passed, making the consent of the Senate necessary both to the appointment and removal of first, second and third class postmasters. 19 Stat. 80, c. 179, § 6.

In the same interval, in March, 1886, President Cleveland, in discussing the requests which the Senate had

made for his reasons for removing officials, and the assumption that the Senate had the right to pass upon those removals and thus to limit the power of the President, said:

"I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that 'the executive power shall be vested in a President of the United States of America,' and that 'he shall take care that the laws be faithfully executed.'

"The Senate belongs to the legislative branch of the Government. When the Constitution by express provision super-added to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duties, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions." 11 Messages and Papers of the Presidents, 4964.

The attitude of the Presidents on this subject has been unchanged and uniform to the present day whenever an issue has clearly been raised. In a message withholding his approval of an act which he thought infringed upon the executive power of removal, President Wilson said:

"It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal, derived from the Constitution." 59 Congressional Record (June 4, 1920), 8609.

And President Coolidge, in a message to Congress, in response to a resolution of the Senate that it was the sense of that body that the President should immediately request the resignation of the then Secretary of the Navy, replied:

"No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under executive control.

". . . The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an executive function. I regard this as a vital principle of our Government." 65 Congressional Record (Feb. 13, 1924), 2335.

In spite of the foregoing Presidential declarations, it is contended that, since the passage of the Tenure of Office Act, there has been general acquiescence by the Executive in the power of Congress to forbid the President alone to remove executive officers—an acquiescence which has changed any formerly accepted constitutional construction to the contrary. Instances are cited of the signed approval by President Grant and other Presidents of legislation in derogation of such construction. We think these are all to be explained, not by acquiescence therein, but by reason of the otherwise valuable effect of the legislation approved. Such is doubtless the explanation of the executive approval of the Act of 1876, which we are considering, for it was an appropriation act on which the section here in question was imposed as a rider.

In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objec-

tion in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized. No instance is cited to us where any question has arisen respecting a removal of a Postmaster General or one of his assistants. The President's request for resignations of such officers is generally complied with. The same thing is true of the postmasters. There have been many executive removals of them and but few protests or objections. Even when there has been a refusal by a postmaster to resign, removal by the President has been followed by a nomination of a successor, and the Senate's confirmation has made unimportant the inquiry as to the necessity for the Senate's consent to the removal.

Other acts of Congress are referred to which contain provisions said to be inconsistent with the 1789 decision. Since the provision for an Interstate Commerce Commission, in 1887, many administrative boards have been created whose members are appointed by the President, by and with the advice and consent of the Senate, and in the statutes creating them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President. This, however, is shown to be unfounded by the case of *Shurtleff* v. *United States,* 189 U. S. 311 (1903). That concerned an act creating a board of general appraisers, 26 Stat. 131, 136, c. 407, § 12, and providing for their removal for inefficiency, neglect of duty or malfeasance in office. The President removed an appraiser without notice or hearing. It was forcibly contended that the affirmative language of the statute implied the negative of the power to remove, except for cause and after a hearing. This would

have been the usual rule of construction, but the Court declined to apply it. Assuming for the purpose of that case only, but without deciding, that Congress might limit the President's power to remove, the Court held that, in the absence of constitutional or statutory provision otherwise, the President could by virtue of his general power of appointment remove an officer, though appointed by and with the advice and consent of the Senate, and notwithstanding specific provisions for his removal for cause, on the ground that the power of removal inhered in the power to appoint. This is an indication that many of the statutes cited are to be reconciled to the unrestricted power of the President to remove, if he chooses to exercise his power.

There are other later acts pointed out in which, doubtless, the inconsistency with the independent power of the President to remove is clearer, but these can not be said really to have received the acquiescence of the executive branch of the Government. Whenever there has been a real issue in respect of the question of Presidential removals, the attitude of the Executive in Congressional message has been clear and positive against the validity of such legislation. The language of Mr. Cleveland in 1886, twenty years after the Tenure of Office Act, in his controversy with the Senate in respect of his independence of that body in the matter of removing inferior officers appointed by him and confirmed by the Senate, was quite as pronounced as that of General Jackson in a similar controversy in 1835. Mr. Wilson in 1920 and Mr. Coolidge in 1924 were quite as all-embracing in their views of the power of removal as General Grant in 1869, and as Mr. Madison and Mr. John Adams in 1789.

The fact seems to be that all departments of the Government have constantly had in mind, since the passage of the Tenure of Office Act, that the question of power of removal by the President of officers appointed by him

with the Senate's consent, has not been settled adversely to the legislative action of 1789 but, in spite of Congressional action, has remained open until the conflict should be subjected to judicial investigation and decision.

The action of this Court can not be said to constitute assent to a departure from the legislative decision of 1789, when the *Parsons* and *Shurtleff* cases, one decided in 1897, and the other in 1903, are considered; for they certainly leave the question open. *Wallace* v. *United States*, 257 U. S. 541. Those cases indicate no tendency to depart from the view of the First Congress. This Court has, since the Tenure of Office Act, manifested an earnest desire to avoid a final settlement of the question until it should be inevitably presented, as it is here.

An argument *ab inconvenienti* has been made against our conclusion in favor of the executive power of removal by the President, without the consent of the Senate—that it will open the door to a reintroduction of the spoils system. The evil of the spoils system aimed at in the civil service law and its amendments is in respect of inferior offices. It has never been attempted to extend that law beyond them. Indeed, Congress forbids its extension to appointments confirmed by the Senate, except with the consent of the Senate. Act of January 16, 1883, 22 Stat. 403, 406, c. 27, sec. 7. Reform in the federal civil service was begun by the Civil Service Act of 1883. It has been developed from that time, so that the classified service now includes a vast majority of all the civil officers. It may still be enlarged by further legislation. The independent power of removal by the President alone, under present conditions, works no practical interference with the merit system. Political appointments of inferior officers are still maintained in one important class, that of the first, second and third class postmasters, collectors of internal revenue, marshals, collectors of customs and other officers of that

kind, distributed through the country. They are appointed by the President with the consent of the Senate. It is the intervention of the Senate in their appointment, and not in their removal, which prevents their classification into the merit system. If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics, and that is what a number of Presidents have recommended. President Hayes, whose devotion to the promotion of the merit system and the abolition of the spoils system was unquestioned, said, in his 4th Annual Message, of December 6, 1880, that the first step to improvement in the civil service must be a complete divorce between Congress and the Executive on the matter of appointments, and he recommended the repeal of the Tenure of Office Act of 1867 for this purpose. 10 & 11 Messages and Papers of the Presidents, 4555–4557. The extension of the merit system rests with Congress.

What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest

weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for seventy-three years, and this although the matter, in the heat of political differences between the Executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351; *Cohens* v. *Virginia*, 6 Wheat. 264, 420; *Prigg* v. *Pennsylvania*, 16 Pet. 544, 621; *Cooley* v. *Board of Wardens, etc.*, 12 How. 299, 315; *Burroughs-Giles Lithographing Company* v. *Sarony*, 111 U. S. 53, 57; *Ames* v. *Kansas*, 111 U. S. 449, 463–469; *The Laura*, 114 U. S. 411, 416; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297; *McPherson* v. *Blacker*, 146 U. S. 1, 28, 33, 35; *Knowlton* v. *Moore*, 178 U. S. 41, 56; *Fairbank* v. *United States*, 181 U. S. 283, 308; *Ex parte Grossman*, 267 U. S. 87, 118.

We are now asked to set aside this construction, thus buttressed, and adopt an adverse view, because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the States which attempted to withdraw from the Union at the time of the Civil War. The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our Government, leading to articles of impeachment against President Johnson, and his acquittal. Without animadvert-

ing on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States during a political calm and acquiesced in by the whole Government for three-quarters of a century, especially when the new construction contended for has never been acquiesced in by either the executive or the judicial departments. While this Court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the references it has made to the history of the question, and in the presumptions it has indulged in favor of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and can not ignore. When, on the merits, we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid. This leads to an affirmance of the judgment of the Court of Claims.

Before closing this opinion, we wish to express the obligation of the Court to Mr. Pepper for his able brief and argument as a friend of the Court. Undertaken at our request, our obligation is none the less if we find ourselves obliged to take a view adverse to his. The strong presentation of arguments against the conclusion of the Court

is of the utmost value in enabling the Court to satisfy itself that it has fully considered all that can be said.

Judgment affirmed.

MR. JUSTICE HOLMES, dissenting.

My brothers MCREYNOLDS and BRANDEIS have discussed the question before us with exhaustive research and I say a few words merely to emphasize my agreement with their conclusion.

The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spider's webs inadequate to control the dominant facts.

We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

The separate opinion of Mr. Justice McReynolds.

The following provisions of the Act making appropriations for the Post Office Department, approved July 12, 1876, (c. 179, 19 Stat. 78, 80), have not been repealed or superseded.

"Sec. 5. That the postmasters shall be divided into four classes [based on annual compensation]. . . . Sec. 6. Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law; and postmasters of the fourth class shall be appointed and may be removed by the Postmaster-General, by whom all appointments and removals shall be notified to the Auditor for the Post Office Department."

The President nominated and with consent of the Senate appointed Frank S. Myers first-class postmaster at Portland, Ore., for four years, commencing July 21, 1917, and undertook to remove him February 3, 1920. The Senate has never approved the removal. Myers protested, asserted illegality of the order, refused to submit, and was ejected. He sued to recover the prescribed salary for the period between February 3, 1920, and July 21, 1921. Judgment must go against the United States unless the President acted within powers conferred by the Constitution.

II.

May the President oust at will all postmasters appointed with the Senate's consent for definite terms under an Act which inhibits removal without consent of that body? May he approve a statute which creates an inferior office and prescribes restrictions on removal, appoint an incumbent, and then remove without regard to the restrictions? Has he power to appoint to an inferior office for a definite term under an Act which prohibits removal except as therein specified, and then arbitrarily

dismiss the incumbent and deprive him of the emoluments? I think there is no such power. Certainly it is not given by any plain words of the Constitution; and the argument advanced to establish it seems to me forced and unsubstantial.

A certain repugnance must attend the suggestion that the President may ignore any provision of an Act of Congress under which he has proceeded. He should promote and not subvert orderly government. The serious evils which followed the practice of dismissing civil officers as caprice or interest dictated, long permitted under congressional enactments, are known to all. It brought the public service to a low estate and caused insistent demand for reform. "Indeed, it is utterly impossible not to feel, that, if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing man, of high ambition and feeble principles, an instrument of the worst oppression and most vindictive vengeance." Story on the Constitution, §1539.

During the notable Senate debate of 1835 (Debates, 23d Cong., 2d sess.) experienced statesmen pointed out the very real dangers and advocated adequate restraint, through congressional action, upon the power which statutes then permitted the President to exercise.

Mr. Webster declared (p. 469): "I deem this degree of regulation, at least, necessary, unless we are willing to submit all these officers to an absolute and perfectly irresponsible removing power, a power which, as recently exercised, tends to turn the whole body of public officers into partisans, dependants, favorites, sycophants, and man-worshippers."

Mr. Clay asserted (*id.* 515): "The power of removal, as now exercised, is nowhere in the Constitution expressly recognized. The only mode of displacing a public officer for which it does provide is by impeachment. But it has been argued on this occasion, that it is a sovereign power, an inherent power, and an executive power; and, there-

fore, that it belongs to the President. Neither the premises nor the conclusion can be sustained. If they could be, the people of the United States have all along totally misconceived the nature of their government, and the character of the office of their supreme magistrate. Sovereign power is supreme power; and in no instance whatever is there any supreme power vested in the President. Whatever sovereign power is, if there be any, conveyed by the Constitution of the United States, is vested in Congress, or in the President and Senate. The power to declare war, to lay taxes, to coin money, is vested in Congress; and the treaty-making power in the president and Senate. The Postmaster General has the power to dismiss his deputies. Is that a sovereign power or has he any?

"Inherent power! That is a new principle to enlarge the powers of the general government. . . . The partisans of the executive have discovered a third and more fruitful source of power. Inherent power! Whence, is it derived? The Constitution created the office of President, and made it just what it is. It had no powers prior to its existence. It can have none but those which are conferred upon it by the instrument which created it, or laws passed in pursuance of that instrument. Do gentlemen mean by inherent power, such power as is exercised by the monarchs or chief magistrates of other countries? If that be their meaning they should avow it."

And Mr. Calhoun argued (*id.* 553): "Hear what that sacred instrument says: 'Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers' (those granted to Congress itself) 'and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.' Mark the fulness of the expression. Congress shall have

power to make all laws, not only to carry into effect the powers expressly delegated to itself, but those delegated to the government or any department or officer thereof; and of course comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows, of course, to whatever express grant of power to the executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the Constitution cited, from the executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best."

The long struggle for civil service reform and the legislation designed to insure some security of official tenure ought not to be forgotten. Again and again Congress has enacted statutes prescribing restrictions on removals and by approving them many Presidents have affirmed its power therein.

The following are some of the officers who have been or may be appointed with consent of the Senate under such restricting statutes.

Members of the Interstate Commerce Commission, Board of General Appraisers, Federal Reserve Board, Federal Trade Commission, Tariff Commission, Shipping Board, Federal Farm Loan Board, Railroad Labor Board; officers of the Army and Navy; Comptroller General; Postmaster General and his assistants; postmasters of the first, second and third classes; judge of the United States Court for China; judges of the Court of Claims, established in 1855, the judges to serve "during good behavior"; judges of Territorial (statutory) courts; judges of the

Supreme Court and Court of Appeals for the District of Columbia (statutory courts), appointed to serve "during good behavior." Also members of the Board of Tax Appeals provided for by the Act of February 26, 1926, to serve for 12 years, who "shall be appointed by the President by and with the advice and consent of the Senate solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President after notice and opportunity for public hearing, for inefficiency, neglect of duty or malfeasance in office but for no other cause."

Every one of these officers, we are now told in effect, holds his place subject to the President's pleasure or caprice.* And it is further said, that Congress cannot create any office to be filled through appointment by the President with consent of the Senate—except judges of the Supreme, Circuit and District (constitutional) courts—and exempt the incumbent from arbitrary dismissal. These questions press for answer; and thus the cause becomes of uncommon magnitude.

III.

Nothing short of language clear beyond serious disputation should be held to clothe the President with authority wholly beyond congressional control arbitrarily to dismiss every officer whom he appoints except a few judges. There are no such words in the Constitution, and the asserted inference conflicts with the heretofore accepted theory that this government is one of carefully enumerated powers under an intelligible charter. "This instrument contains an enumeration of powers expressly granted." *Gibbons* v. *Ogden,* 9 Wheat. 1, 187. "Nor should it ever be lost sight of, that the government of

*The suggestion that different considerations may possibly apply to nonconstitutional judicial officers, I regard as a mere smoke screen.

the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is *pro tanto* the establishment of a new Constitution. It is doing for the people what they have not chosen to do for themselves. It is usurping the functions of a legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, *ita lex scripta est,* to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice than mere policy and convenience." Story on the Constitution, § 426.

If the phrase "executive power" infolds the one now claimed, many others heretofore totally unsuspected may lie there awaiting future supposed necessity; and no human intelligence can define the field of the President's permissible activities. "A masked battery of constructive powers would complete the destruction of liberty."

IV.

Constitutional provisions should be interpreted with the expectation that Congress will discharge its duties no less faithfully than the Executive will attend to his. The legislature is charged with the duty of making laws for orderly administration obligatory upon all. It possesses supreme power over national affairs and may wreck as well as speed them. It holds the purse; every branch of the government functions under statutes which embody its will; it may impeach and expel all civil officers. The duty is upon it "to make all laws which shall be necessary and proper for carrying into execution" all powers of the federal government. We have no such thing as three totally distinct and independent departments; the others must look to the legislative for direction and

support. "In republican government the legislative authority necessarily predominates." The Federalist, XLVI, XVII. Perhaps the chief duty of the President is to carry into effect the will of Congress through such instrumentalities as it has chosen to provide. Arguments, therefore, upon the assumption that Congress may wilfully impede executive action are not important.

The Constitution provides—

"Art I, Sec. 1. All legislative powers herein granted shall be vested in a Congress of the United States. . . . Sec. 2. . . . The House of Representatives . . . shall have the sole power of impeachment. Sec. 3. . . . The Senate shall have the sole power to try all impeachments. . . . Sec. 8. The Congress shall have power . . . To establish post offices and post roads; . . . To raise and support armies . . . To provide and maintain a navy; To make rules for the government and regulation of the land and naval forces; . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

"Art. II, Sec. 1. The executive power shall be vested in a President of the United States. . . .

"Sec. 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nomi-

nate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

"Sec. 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

"Art. III, Sec. 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

"Sec. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . ."

V.

For the United States it is asserted—Except certain judges, the President may remove all officers whether ex-

ecutive or judicial appointed by him with the Senate's consent; and therein he cannot be limited or restricted by Congress. The argument runs thus—The Constitution gives the President all executive power of the national government except as this is checked or controlled by some other definite provision; power to remove is executive and unconfined; accordingly, the President may remove at will. Further, the President is required to take care that the laws be faithfully executed; he cannot do this unless he may remove at will all officers whom he appoints; therefore he has such authority.

The argument assumes far too much. Generally, the actual ouster of an officer is executive action; but to prescribe the conditions under which this may be done is legislative. The act of hanging a criminal is executive; but to say when and where and how he shall be hanged is clearly legislative. Moreover, officers may be removed by direct legislation—the Act of 1820 hereafter referred to did this. "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose, or for the common defense, seem to comprise all the functions of the executive magistrate." The Federalist, No. LXXIV.

The legislature may create post offices and prescribe qualifications, duties, compensation and term. And it may protect the incumbent in the enjoyment of his term unless in some way restrained therefrom. The real question, therefore, comes to this—Does any constitutional provision definitely limit the otherwise plenary power of Congress over postmasters, when they are appointed by the President with consent of the Senate? The question is not the much-mooted one whether the Senate is part of the appointing power under the Constitution and therefore must participate in removals. Here the restriction

is imposed by statute alone and thereby made a condition of the tenure. I suppose that beyond doubt Congress could authorize the Postmaster General to appoint all postmasters and restrain him in respect of removals.

Concerning the insistence that power to remove is a necessary incident of the President's duty to enforce the laws, it is enough now to say: The general duty to enforce all laws cannot justify infraction of some of them. Moreover, Congress, in the exercise of its unquestioned power, may deprive the President of the right either to appoint or to remove any inferior officer, by vesting the authority to appoint in another. Yet in that event his duty touching enforcement of the laws would remain. He must utilize the force which Congress gives. He cannot, without permission, appoint the humblest clerk or expend a dollar of the public funds.

It is well to emphasize that our present concern is with the removal of an "inferior officer," within Art. II, Sec. 2, of the Constitution, which the statute positively prohibits without consent of the Senate. This is no case of mere suspension. The demand is for salary and not for restoration to the service. We are not dealing with an ambassador, public minister, consul, judge or "superior officer." Nor is the situation the one which arises when the statute creates an office without a specified term, authorizes appointment and says nothing of removal. In the latter event, under long-continued practice and supposed early legislative construction, it is now accepted doctrine that the President may remove at pleasure. This is entirely consistent with implied legislative assent; power to remove is commonly incident to the right to appoint when not forbidden by law. But there has never been any such usage where the statute prescribed restrictions. From its first session down to the last one Congress has consistently asserted its power to prescribe conditions concerning the removal of inferior officers. The executive

has habitually observed them, and this Court has affirmed the power of Congress therein.*

VI.

Some reference to the history of postal affairs will indicate the complete control which Congress has asserted over them with general approval by the executive.

The Continental Congress (1775) established a post office and made Benjamin Franklin Postmaster General, "with power to appoint such and so many deputies, as to him may seem proper and necessary." Under the Articles of Confederation (1781) Congress again provided for a post office and Postmaster General, with "full power and authority to appoint a clerk, or assistant to himself, and such and so many deputy postmasters as he shall think proper." The first Congress under the Constitution (1789) directed: "That there shall be appointed a Postmaster General; his powers and salary, and the compensation to the assistant or clerk and deputies which he may appoint, and the regulations of the post office shall be the same as they last were under the resolutions and ordinances of the late Congress. The Postmaster General to be subject to the direction of the President of the United States in performing the duties of his office, and in forming contracts for the transportation of the mail."

The Act of 1792 (1 Stat. 232, 234) established certain post roads, prescribed regulations for the Department,

* Different phases of this general subject have been elaborately discussed in Congress. See discussions on the following measures: Bill to establish a Department of Foreign Affairs, 1789, Annals 1st Cong.; bill to amend the judicial system of the United States, 1802, Annals 7th Cong., 1st Sess.; bill to amend Act of May 15, 1820, fixing tenure of certain offices, 1835, Debates 23d Cong., 2d Sess.; bill to regulate the tenure of certain civil offices, 1866–1867, Globe, 39th Cong., 3d Sess.; Johnson impeachment trial, 1868, Globe Supplement, 40th Cong., 2d Sess.

and continued in the Postmaster General sole power of appointment; but it omitted the earlier provision that he should "be subject to the direction of the President of the United States in performing the duties of his office."

The Act of March 2, 1799, provided: "That there be established at the seat of Government of the United States, a General Post Office, under the direction of a Postmaster General. The Postmaster General shall appoint an assistant, and such clerks as may be necessary for performing the business of his office; he shall establish post offices, and appoint postmasters, at all such places as shall appear to him expedient, on the post roads that are or may be established by law." This provision remained until 1836; and prior to that time all postmasters were appointed without designated terms and were subject to removal by the Postmaster General alone.

In 1814 Postmaster General Granger appointed Senator Leib postmaster at Philadelphia contrary to the known wishes of President Madison. Granger was removed; but Leib continued to hold his office.

John Quincy Adams records in his Memoirs (January 5, 1822), that the President "summoned an immediate meeting of the members of the administration, which was fully attended. It was upon the appointment of the postmaster at Albany." A warm discussion arose with much diversity of opinion concerning the propriety of the Postmaster General's request for the President's opinion concerning the proposed appointment. "The President said he thought it very questionable whether he ought to interfere in the case at all." Some members severely censured the Postmaster General for asking the President's opinion after having made up his own mind, holding it an attempt to shift responsibility. "I said I did not see his conduct exactly in the same light. The law gave the appointment of all the postmasters exclusively

to the Postmaster General; but he himself was removable from his own office at the pleasure of the President. Now, Mr. Granger had been removed with disgrace by President Madison for appointing Dr. Leib postmaster at Philadelphia. Mr. Meigs, therefore, in determining to appoint General Van Rensselaer, not only exercised a right but performed a duty of his office; but, with the example of Mr. Granger's dismission before him, it was quite justifiable in him to consult the President's wish, with the declared intention of conforming to it. I thought I should have done the same under similar circumstances."

Act of July 2, 1836 (5 Stat. 80, 87)—"That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a Deputy Postmaster for each post office at which the commissions allowed to the postmaster amounted to one thousand dollars or upwards in the year ending the thirtieth day of June, one thousand eight hundred and thirty-five, or which may, in any subsequent year, terminating on the thirtieth day of June, amount to or exceed that sum, who shall hold his office for the term of four years, unless sooner removed by the President." This is the first Act which permitted appointment of any postmaster by the President; the first also which fixed terms for them. It was careful to allow removals by the President, which otherwise, under the doctrine of *Marbury* v. *Madison*, 1 Cranch. 137, would have been denied him. And by this legislation Congress itself terminated the services of postmasters who had been appointed to serve at will.

The Act of 1863 (12 Stat. 701) empowered the Postmaster General to appoint and commission all postmasters whose salary or compensation "have been ascertained to be less than one thousand dollars." In 1864 five distinct classes were created (13 Stat. 335); and the Act of 1872 (17 Stat. 292) provided—"That postmasters of the fourth and fifth class shall be appointed and may be removed

by the Postmaster General, and all others shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law."

In 1874 (18 Stat. 231, 233) postmasters were divided into four classes according to compensation and the statute directed that those "of the first, second, and third classes shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law; and postmasters of the fourth class shall be appointed and may be removed by the Postmaster General, by whom all appointments and removals shall be notified to the Auditor for the Post Office Department." This language reappears in § 6, Act July 12, 1876, *supra.*

On July 1, 1925, there were 50,957 postmasters; 35,758 were of the fourth class.

For 47 years (1789 to 1836) the President could neither appoint nor remove any postmaster. The Act which first prescribed definite terms for these officers authorized him to do both. Always it has been the duty of the President to take care that the postal laws "be faithfully executed"; but there did not spring from this any illimitable power to remove postmasters.

VII.

The written argument for the United States by the former Solicitor General avers that it is based on this premise: "The President's supervision of the executive branch of the government, through the necessary power of removal, has always been recognized, and is now recognized, alike by considerations of necessity and the theory of government as an executive power, and is clearly indicated in the text of the Constitution, even though the

power of removal is not expressly granted." A discourse proceeding from that premise helps only because it indicates the inability of diligent counsel to discover a solid basis for his contention. The words of the Constitution are enough to show that the framers never supposed orderly government required the President either to appoint or to remove postmasters. Congress may vest the power to appoint and remove all of them in the head of a department and thus exclude them from presidential authority. From 1789 to 1836 the Postmaster General exercised these powers, as to all postmasters (Story on the Constitution, § 1536), and the 35,000 in the fourth class are now under his control. For forty years the President functioned and met his duty to "take care that the laws be faithfully executed" without the semblance of power to remove any postmaster. So I think the supposed necessity and theory of government are only vapors.

VIII.

Congress has authority to provide for postmasters and prescribe their compensation, terms and duties. It may leave with the President the right to appoint them with consent of the Senate or direct another to appoint. In the latter event *United States* v *Perkins,* 116 U. S. 483, 485, makes it clear that the right to remove may be restricted. But, so the argument runs, if the President appoints with consent of the Senate his right to remove can not be abridged because Art. II of the Constitution vests in him the "executive power," and this includes an illimitable right to remove. The Constitution empowers the President to appoint Ambassadors, other public ministers, consuls, judges of the Supreme Court and superior officers, and no statute can interfere therein. But Congress may authorize both appointment and removal of all inferior officers without regard to the President's wishes—even in direct opposition to them. This important distinction

must not be overlooked. And consideration of the complete control which Congress may exercise over inferior officers is enough to show the hollowness of the suggestion that a right to remove them may be inferred from the President's duty to "take care that the laws be faithfully executed." He cannot appoint any inferior officer, however humble, without legislative authorization; but such officers are essential to execution of the laws. Congress may provide as many or as few of them as it likes. It may place all of them beyond the President's control; but this would not suspend his duty concerning faithful execution of the laws. Removals, however important, are not so necessary as appointments.

IX.

I find no suggestion of the theory that "the executive power" of Art. II, Sec. 1, includes all possible federal authority executive in nature unless definitely excluded by some constitutional provision, prior to the well-known House debate of 1789, when Mr. Madison seems to have given it support. A resolution looking to the establishment of an executive department—Department of Foreign Affairs (afterwards State)—provided for a secretary, "who shall be appointed by the President by and with the advice and consent of the Senate and to be removable by the President." Discussion arose upon a motion to strike out, "to be removable by the President." The distinction between superior and inferior officers was clearly recognized; also that the proposed officer was superior and must be appointed by the President with the Senate's consent. The bill prescribed no definite term—the incumbent would serve until death, resignation or removal. In the circumstances most of the speakers recognized the rule that where there is no constitutional or legislative restriction power to remove is incidental to that of appointment. Accordingly, they thought the

President could remove the proposed officer; but many supposed he must do so with consent of the Senate. They maintained that the power to appoint is joint.

Twenty-four of the fifty-four members spoke and gave their views on the Constitution and sundry matters of expediency. The record fairly indicates that nine, including Mr. Madison, thought the President would have the right to remove an officer serving at will under direct constitutional grant; three thought the Constitution did not and although Congress might it ought not to bestow such power; seven thought the Constitution did not and Congress could not confer it; five were of opinion that the Constitution did not but that Congress ought to confer it. Thus, only nine members said anything which tends to support the present contention, and fifteen emphatically opposed it.

The challenged clause, although twice formally approved, was finally stricken out upon assurance that a new provision (afterwards adopted) would direct disposition of the official records "whenever the said principal officer shall be removed from office by the President of the United States or in any other case of vacancy." This was susceptible of different interpretations and probably did not mean the same thing to all. The majority said nothing. The result of the discussion and vote was to affirm that the President held the appointing power with a right of negation in the Senate; and that, under the commonly accepted rule, he might remove without concurrence of the Senate when there was no inhibition by Constitution or statute. That the majority did not suppose they had assented to the doctrine under which the President could remove inferior officers contrary to an inhibition prescribed by Congress, is shown plainly enough by the passage later in the same session of two Acts containing provisions wholly inconsistent with any such idea. Acts of August 7, 1789, and September 24, 1789, *infra*.

Following much discussion of Mr. Madison's motion of May 19, a special committee reported this bill to the House on June 2. Debates upon it commenced June 16 and continued until June 24, when it passed by twenty-nine to twenty-two. The Senate gave it great consideration, commencing June 25, and passed it July 18, with amendments accepted by the House July 20. The Diary of President John Adams (Works 1851 ed., v. 3, p. 412) states that the Senate voted nine to nine and that the deciding vote was given by the Vice President in favor of the President's power to remove. He also states that Senator Ellsworth strongly supported the bill and Senator Patterson voted for it. These senators were members of the committee which drafted the Judiciary Bill spoken of below.

It seems indubitable that when the debate began Mr. Madison did not entertain the extreme view concerning illimitable presidential power now urged upon us; and it is not entirely clear that he had any very definite convictions on the subject when the discussion ended. Apparently this notion originated with Mr. Vining, of Delaware, who first advanced it on May 19. Considering Mr. Madison's remarks (largely argumentative) as a whole, they give it small, if any, support. Some of them, indeed, are distinctly to the contrary. He was author of the provision that the Secretary shall "be removable by the President"; he thought it "safe and expedient to adopt the clause," and twice successfully resisted its elimination—May 19 and June 19. He said: "I think it absolutely necessary that the President should have the power of removing from office. . . . On the constitutionality of the declaration I have no manner of doubt." "He believed they [his opponents] would not assert that any part of the Constitution declared that the only way to remove should be by impeachment; the contrary might be inferred, because Congress may establish offices by law;

therefore, most certainly, it is in the discretion of the legislature to say upon what terms the office shall be held, either during good behavior or during pleasure." "I have, since the subject was last before the House, examined the Constitution with attention, and I acknowledge that it does not perfectly correspond with the ideas I entertained of it from the first glance. . . . I have my doubts whether we are not absolutely tied down to the construction declared in the bill. . . . If the Constitution is silent, and it is a power the legislature have a right to confer, it will appear to the world, if we strike out the clause, as if we doubted the propriety of vesting it in the President of the United States. I therefore think it best to retain it in the bill." *

*This debate began May 19 in the Committee of the Whole on Mr. Madison's motion—"That it is the opinion of this committee, that there shall be established an executive department, to be denominated the Department of Foreign Affairs, at the head of which there shall be an officer, to be called the Secretary to the Department of Foreign Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate; and to be removable by the President."

The words, "who shall be appointed by the President, by and with the advice and consent of the Senate," were objected to as superfluous since "the Constitution had expressly given the power of appointment in words there used," and Mr. Madison agreed to their elimination.

Doubts were then expressed whether the officer could be removed by the President. The suggestion was that this could only be done by impeachment. Mr. Madison opposed the suggestion, and said: "I think the inference would not arise from a fair construction of the words of that instrument. . . . I think it absolutely necessary that the President should have the power of removing from office. . . . On the constitutionality of the declaration I have no manner of doubt."

Thereupon Mr. Vining, of Delaware, declared: "There were no negative words in the Constitution to preclude the President from the exercise of this power; but there was a strong presumption that he was invested with it: because it was declared, that all executive

Writing to Edmund Randolph, June 17, 1789, Mr. Madison pointed out the precise point of the debate. "A very interesting question is started—By whom officers appointed during pleasure by the President and Senate are to be displaced." And on June 21, 1789, he advised Edmund Pendleton of the discussion, stated the four opinions held by members, and said: "The last opinion

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power should be vested in him, except in cases where it is otherwise qualified; as, for example, he could not fully exercise his executive power in making treaties, unless with the advice and consent of the Senate—the same in appointing to office."

Mr. Bland and Mr. Jackson further insisted that removal could be effected only through impeachment, and Mr. Madison replied: He "did not conceive it was a proper construction of the Constitution to say that there was no other mode of removing from office than that by impeachment; he believed this, as applied to the judges, might be the case; but he could never imagine it extended in the manner which gentlemen contended for. He believed they would not assert, that any part of the Constitution declared that the only way to remove should be by impeachment; the contrary might be inferred, because Congress may establish offices by law; therefore, most certainly, it is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour or during pleasure."

Later in the day Mr. Madison discussed various objections offered and said: "I cannot but believe, if gentlemen weigh well these considerations, they will think it safe and expedient to adopt the clause." Others spoke briefly, and then, as the record recites, "The question was now taken, and carried by a considerable majority, in favor of declaring the power of removal to be in the President." The resolution was reported; the House concurred; and a committee (including Mr. Madison) was appointed to prepare and bring in a bill.

On June 2 the committee reported a bill, providing for a Secretary, "to be removable from office by the President of the United States," which was read and referred to the Committee of the Whole. It was taken up for consideration June 16, and the discussion continued during five days. Members expressed radically different views. Among other things Mr. Madison said—

"I have, since the subject was last before the House, examined the Constitution with attention; and I acknowledge that it does not perfectly correspond with the ideas I entertained of it from the first

[the one he held] has prevailed, but is subject to various modifications, by the power of the legislature to limit the duration of laws creating offices, or the duration of the appointments for filling them, and by the power over the salaries and appropriations."

Defending the Virginia Resolutions (of 1798) after careful preparation aided by long experience with national affairs, Mr. Madison emphasized the doctrine that

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glance. . . . By a strict examination of the Constitution, on what appears to be its true principles, and considering the great departments of the government in the relation they have to each other, I have my doubts whether we are not absolutely tied down to the construction declared in the bill. . . .

"If this is the true construction of this instrument, the clause in the bill is nothing more than explanatory of the meaning of the Constitution, and therefore not liable to any particular objection on that account. If the Constitution is silent, and it is a power the legislature have a right to confer, it will appear to the world, if we strike out the clause, as if we doubted the propriety of vesting it in the President of the United States. I therefore think it best to retain it in the bill."

June 19, "the call for the question being now very general, it was put, shall the words 'to be removable by the President,' be struck out? It was determined in the negative; being yeas 20, nays 34." There were further remarks, and "the committee then rose and reported the bill . . . to the House."

Discussion of the disputed provision was renewed on June 22. Mr. Benson moved to amend the bill "so as to imply the power of removal to be in the President," by providing for a Chief Clerk who should have custody of the records, etc., "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." He "hoped his amendment would succeed in reconciling both sides of the House to the decision and quieting the minds of gentlemen." If successful he would move to strike out the words, "to be removable by the President." After a prolonged discussion the amendment prevailed; the much-challenged clause was stricken out and the ambiguous one suggested by Mr. Benson was inserted. June 24 the bill, thus amended, finally passed.

Five members once delegates to the Constitutional Convention took part in the debate. Mr. Madison, Mr. Baldwin and Mr. Clymer expressed similar views; Mr. Sherman and Mr. Gerry were emphatically of the contrary opinion.

the powers of the United States are "particular and limited," that the general phrases of the Constitution must not be so expounded as to destroy the particular enumerations explaining and limiting their meaning, and that latitudinous exposition would necessarily destroy the fundamental purpose of the founders. He continued to hold these general views. In his letters he clearly exposed the narrow point under consideration by the first Congress, also the modification to which his views were subject, and he supported, during the same session, the Judiciary Act and probably the Northwest Territory Act, which contained provisions contrary to the sentiment now attributed to him. It therefore seems impossible to regard what he once said in support of a contested measure as present authority for attributing to the executive those illimitable and undefinable powers which he thereafter reprobated. Moreover, it is the fixed rule that debates are not relied upon when seeking the meaning or effect of statutes.

But if it were possible to spell out of the debate and action of the first Congress on the bill to establish the Department of Foreign Affairs some support for the present claim of the United States, this would be of little real consequence, for the same Congress on at least two occasions took the opposite position; and time and time again subsequent congresses have done the same thing. It would be amazing for this Court to base the interpretation of a constitutional provision upon a single doubtful congressional interpretation when there have been dozens of them extending through a hundred and thirty-five years, which are directly to the contrary effect.

Following the debate of 1789 it became the commonly approved view that the Senate is not a part of the appointing power. Also it became accepted practice that the President might remove at pleasure all officers appointed by him when neither Constitution nor statute

prohibited by prescribing a fixed term or otherwise. Prior to 1820 very few officers held for definite terms; generally they were appointed to serve at pleasure, and Mr. Madison seems always to have regarded this as the proper course. He emphatically disapproved the Act of 1820, which prescribed such terms, and even doubted its constitutionality. Madison's Writings, 1865 ed., vol. 3, p. 196. It was said that, "He thought the tenure of all subordinate executive officers was necessarily the pleasure of the chief by whom they were commissioned. If they could be limited by Congress to four years, they might to one—to a month—to a day—and the executive power might thus be annihilated." Diary, John Quincy Adams, 1875 ed., vol. VII, p. 425.

During the early administrations removals were infrequent and for adequate reasons. President Washington removed ten officers; President John Adams, eight.

Complying with a Resolution of March 2, 1839, President Van Buren sent to the House of Representatives, March 13, 1840, "a list of all [civil] officers of the Government deriving their appointments from the nomination of the President and concurrence of the Senate whose commissions are recorded in the Department of State and who have been removed from office since the 3rd of March, 1789." Document No. 132, 26th Cong., 1st Sess. Two hundred and eight had been removed; and, after a somewhat careful survey of the statutes, I think it true to say, that not one of these removals had been inhibited by Congress. On the contrary, all were made with its consent, either implied from authorization of the appointment for service at pleasure or indicated by express words of the applicable statute. The Act of 1789 authorized appointment of marshals for four years, removable at pleasure. The Act of 1820 established definite terms for many officers, but directed that they "shall be removable from office at pleasure." The Act of 1836 prescribed

fixed terms for certain postmasters and expressly provided for removals by the President.

A summary of the reported officers with commissions in the State Department who were removed, with the number in each class, is in the margin.* The Secretary of the Treasury reported that twenty-four officers in that Department had been removed "since the burning of the Treasury Building in 1833." The Postmaster General reported that thirteen postmasters appointed by the President had been dismissed (prior to 1836 all postmasters were appointed by the Postmaster General; after that time the President had express permission to dismiss those whom he appointed). Nine Indian Agents were removed. One hundred and thirty-nine commissioned officers of the army and twenty-two of the navy were removed. I find no restriction by Congress on the President's right to remove any of these officers. See *Wallace* v. *United States*, 257 U. S. 541.

Prior to the year 1839, no President engaged in the practice of removing officials contrary to congressional di-

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* Officers with commissions in the State Department who were removed: Collectors of customs, 17; collectors and inspectors, 25; surveyors of ports, 4; surveyors and inspectors, 9; supervisors, 4; naval officers, 4; marshals, 28; district attorneys, 23; principal assessors, 3; collectors of direct taxes, 4; consuls, 49; ministers abroad, 5; chargés des affaires, 2; secretaries of legation, 3; Secretary of State, 1; Secretary of War, 1; Secretary of the Treasury, 1; Secretary of the Navy, 1; Attorney General, 1; Commissioner of Loans, 1; receivers of public moneys, 2; registers of land offices, 2; Agent of the Creek Nation, 1; Register of the Treasury, 1; Comptroller of the Treasury, 1; auditors, 2; Treasurer of the United States, 1; Treasurer of the Mint, 1; Commissioner of Public Buildings, 1; Recorder of Land Titles, 1; Judge of territory, 1; secretaries of territories, 2; Commissioner for the adjustment of private land claims, 1; surveyors-general, 2; surveyors of the public lands, 3.

Officers in the Treasury Department who were removed: Surveyor and inspector, 1; naval officer, 1; appraisers, 2; collectors, 2; surveyors, 2; receivers of public moneys, 12; registers of the land office, 4.

rection. There is no suggestion of any such practice which originated after that date.

Rightly understood the debate and Act of 1789 and subsequent practice afford no support to the claim now advanced. In *Marbury* v. *Madison, supra,* this court expressly repudiated it, and that decision has never been overruled. On the contrary, *Shurtleff* v. *United States,* 189 U. S. 311, clearly recognizes the right of Congress to impose restrictions.

Concerning the legislative and practical construction following this debate Mr. Justice Story wrote (1833): "It constitutes perhaps the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions. . . . Whether the predictions of the original advocates of the executive power, or those of the opposers of it, are likely, in the future progress of the government, to be realized, must be left to the sober judgment of the community, and to the impartial award of time. If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to 'inferior officers' (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases." Story on the Constitution, §§ 1543, 1544.

Writing in 1826 (*309, 310) Chancellor Kent affirmed: "The Act [the Judiciary Act of September 24, 1789, § 27]

says, that the marshal shall be removable *at pleasure,* without saying by whom; and on the first organization of the government, it was made a question whether the power of removal, in case of officers appointed to hold at pleasure, resided anywhere but in the body which appointed, and of course whether the consent of the Senate was not requisite to remove. This was the construction given to the Constitution while it was pending for ratification before the state conventions, by the author of The Federalist. . . . But the construction which was given to the Constitution by Congress, after great consideration and discussion, was different. In the Act for establishing the Treasury Department, the Secretary was contemplated as being removable from office by the President. The words of the Act are, 'That whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office, the assistant shall act,' &c. This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of government appointed by the President and Senate, *whose term of duration is not specially declared.*"

These great expounders had no knowledge of any practical construction of the Constitution sufficient to support the theory here advanced. This court knew nothing of it in 1803 when it decided *Marbury* v. *Madison;* and we have the assurance of Mr. Justice McLean (*United States* v. *Guthrie,* 17 How. 284, 305) that it adhered to the view there expressed so long as Chief Justice Marshall lived. And neither Calhoun, nor Clay, nor Webster knew of any such thing during the debate of 1835 when they advocated limitation, by further legislation, of powers granted to the President by the Act of 1820.

If the remedy suggested by Mr. Justice Story and long supposed to be efficacious should prove to be valueless,

I suppose Congress may enforce its will by empowering the courts or heads of departments to appoint all officers except representatives abroad, certain judges and a few "superior" officers—members of the cabinet. And in this event the duty to "take care that the laws be faithfully executed" would remain notwithstanding the President's lack of control. In view of this possibility, under plain provisions of the Constitution, it seems useless, if not, indeed, presumptuous, for courts to discuss matters of supposed convenience or policy when considering the President's power to remove.

X.

Congress has long and vigorously asserted its right to restrict removals and there has been no common executive practice based upon a contrary view. The President has often removed, and it is admitted that he may remove, with either the express or implied assent of Congress; but the present theory is that he may override the declared will of that body. This goes far beyond any practice heretofore approved or followed; it conflicts with the history of the Constitution, with the ordinary rules of interpretation, and with the construction approved by Congress since the beginning and emphatically sanctioned by this court. To adopt it would be revolutionary.

The Articles of Confederation contained no general grant of executive power.

The first constitutions of the States vested in a governor or president, sometimes with and sometimes without a council, "the executive power," "the supreme executive power"; but always in association with carefully defined special grants, as in the federal Constitution itself. They contained no intimation of executive powers except those definitely enumerated or necessarily inferred therefrom or from the duty of the executive to enforce the laws. Speaking in the Convention, July 17,

Mr. Madison said: "The executives of the States are in general little more than cyphers; the legislatures omnipotent."

In the proceedings of the Constitutional Convention no hint can be found of any executive power except those definitely enumerated or inferable therefrom or from the duty to enforce the laws. In the notes of Rufus King (June 1) upon the Convention, this appears—

"Wilson—an extive. ought to possess the powers of secresy, vigour & Dispatch—and to be so constituted as to be responsible—Extive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed—if appointments of Officers are made by a sing. Ex he is responsible for the propriety of the same. Not so where the Executive is numerous.

"Mad: agrees wth. Wilson in his definition of executive powers—executive powers ex vi termini, do not include the Rights of war & peace &c. but the powers shd. be confined and defined—if large we shall have the Evils of elective Monarchies—probably the best plan will be a single Executive of long duration wth. a Council, with liberty to depart from their Opinion at his peril—." Farrand, Records Fed. Con., v. I, p. 70.

If the Constitution or its proponents had plainly avowed what is now contended for there can be little doubt that it would have been rejected.

The Virginia plan, when introduced, provided—

"That a national executive be instituted; to be chosen by the national legislature for the term of years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation.

"That the executive and a convenient number of the national judiciary, ought to compose a council of revision with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by of the members of each branch."

This provision was discussed and amended. When reported by the Committee of the Whole and referred to the Committee on Detail, June 13, it read thus—"Resolved, That a national executive be instituted to consist of a single person, to be chosen by the national legislature for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for—to be ineligible a second time, and to be removable on impeachment and conviction of malpractices or neglect of duty—to receive a fixed stipend by which he may be compensated for the devotion of his time to public service to be paid out of the national treasury. That the national executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two-thirds of each branch of the national legislature."

The Committee on Detail reported: "Sec. 1. The executive power of the United States shall be vested in a single person," etc. This was followed by Sec. 2 with the clear enumeration of the President's powers and duties. Among them were these: "He shall from time to time give information to the Legislature of the state of the Union . . . He shall take care that the laws of the United States be duly and faithfully executed . . . He shall receive ambassadors . . . He shall be commander-in-chief of the Army and Navy." Many of these

were taken from the New York Constitution. After further discussion the enumerated powers were somewhat modified and others were added, among them (September 7), the power "to call for the opinions of the heads of departments, in writing."

It is beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power here claimed.

The New Jersey plan—

"That the United States in Congress be authorized to elect a federal executive to consist of persons, to continue in office for the term of years, to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons composing the executive at the time of such increase or diminution, to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service and for years thereafter; to be ineligible a second time, and removable by Congress on application by a majority of the executives of the several States; that the executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the federal executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as general or in other capacity."

The sketch offered by Mr. Hamilton—

"The supreme executive authority of the United States to be vested in a governor to be elected to serve during good behavior—the election to be made by electors chosen by the people in the election districts aforesaid—the au-

thorities and functions of the executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed; to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (ambassadors to foreign nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except treason; which he shall not pardon without the approbation of the Senate."

XI.

The Federalist, Article LXXVI by Mr. Hamilton, says: "It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government."

XII.

Since the debate of June, 1789, Congress has repeatedly asserted power over removals; this court has affirmed the power; and practices supposed to be impossible have become common.

Mr. Madison was much influenced by supposed expediency, the impossibility of keeping the Senate in constant session, etc.; also the extraordinary personality of the President. He evidently supposed it would become common practice to provide for officers without definite terms, to serve until resignation, death or removal. And this was generally done until 1820. The office under discussion was a superior one, to be filled only by Presidential appointment. He assumed as obviously true things now plainly untrue and was greatly influenced by them. He said—"The danger then consists merely in this: the President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by this House, before the Senate for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust. But what can be his motives for displacing a worthy man? It must be that he may fill the place with an unworthy creature of his own. . . . Now if this be the case with an hereditary monarch, possessed of those high prerogatives and furnished with so many means of influence, can we suppose a President, elected for four years only, dependent upon the popular voice, impeachable by the legislature, little, if at all, distinguished for wealth, personal talents, or influence from the head of the department himself; I say, will he bid defiance to all these considerations, and wantonly dismiss a meritorious and virtuous officer?

Such abuse of power exceeds my conception. If anything takes place in the ordinary course of business of this kind, my imagination cannot extend to it on any rational principle."

We face as an actuality what he thought was beyond imagination and his argument must now be weighed accordingly. Evidently the sentiments which he then apparently held came to him during the debate and were not entertained when he left the Constitutional Convention, nor during his later years. It seems fairly certain that he never consciously advocated the extreme view now attributed to him by counsel. His clearly stated exceptions to what he called the prevailing view and his subsequent conduct repel any such idea.

By an Act approved August 7, 1789, (c. 8, 1 Stat. 50, 53) Congress provided for the future government of the Northwest Territory, originally organized by the Continental Congress. This statute directed: "The President shall nominate and by and with the advice and consent of the Senate shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him; and in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal." The ordinance of 1787 authorized the appointment by Congress of a Governor, "whose commission shall continue in force for the term of three years, unless sooner revoked by Congress;" a secretary, "whose commission shall continue in force for four years, unless sooner revoked;" and three judges, whose "commissions shall continue in force during good behavior." These were not constitutional judges. *American Insurance Co.* v. *Canter,* 1 Pet. 511. Thus Congress, at its first session, inhibited removal of judges

and assented to removal of the first civil officers for whom it prescribed fixed terms. It was wholly unaware of the now-supposed construction of the Constitution which would render these provisions improper. There had been no such construction; the earlier measure and debate related to an officer appointed by legislative consent to serve at will and whatever was said must be limited to that precise point.

On August 18, 1789, the President nominated, and on the twentieth the Senate "did advise and consent" to the appointment of, the following officers for the Territory: Arthur St. Clair, Governor; Winthrop Sargent, Secretary; Samuel Holden Parsons, John Cleves Symmes and William Barton, judges of the court.

The bill for the Northwest Territory was a House measure, framed and presented July 16, 1789, by a special committee of which Mr. Sedgwick, of Massachusetts, was a member, and passed July 21 without roll call. The Senate adopted it August 4. The debate on the bill to create the Department of Foreign Affairs must have been fresh in the legislative mind; and it should be noted that Mr. Sedgwick had actively supported the power of removal when that measure was up.

The Act of September 24, 1789 (c. 20, § 27, 1 Stat. 73, 87), provided for another civil officer with fixed term. "A marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be", etc. This Act also provided for district attorneys and an Attorney General without fixed terms and said nothing of removal. The legislature must have understood that if an officer be given a fixed term and nothing is said concerning removal he acquires a vested right to the office for the full period; also that officers appointed without definite terms were subject to removal by the President at will, assent of Congress being implied.

This bill was a Senate measure, prepared by a committee of which Senators Ellsworth and Paterson were members and introduced June 12. It was much considered between June 22 and July 17, when it passed the Senate fourteen to six. During this same period the House bill to create the Department of Foreign Affairs was under consideration by the Senate, and Senators Ellsworth and Paterson both gave it support. The Judiciary bill went to the House July 20, and there passed September 17. Mr. Madison supported it.

If the theory of illimitable executive power now urged is correct, then the Acts of August 7 and September 24 contained language no less objectionable than the original phrase in the bill to establish the Department of Foreign Affairs over which the long debate arose. As nobody objected to the provisions concerning removals and life tenure in the two later Acts it seems plain enough that the first Congress never entertained the constitutional views now advanced by the United States. As shown by Mr. Madison's letter to Edmund Randolph, *supra,* the point under discussion was the power to remove officers appointed to serve at will. Whatever effect is attributable to the action taken must be confined to such officers.

Congress first established courts in the District of Columbia by the Act of February 27, 1801, c. 15, 2 Stat. 103. This authorized three judges to be appointed by the President with consent of the Senate "to hold their respective offices during good behavior." The same tenure has been bestowed on all subsequent superior District of Columbia judges. The same Act also provided for a marshal, to serve during four years, subject to removal at pleasure; for a district attorney without definite term, and "such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient, to con-

tinue in office five years." Here, again, Congress undertook to protect inferior officers in the District from executive interference, and the same policy has continued down to this time. (See Act of February 9, 1893, c. 74, 27 Stat. 434.)

The Acts providing "for the government of the Territory of the United States south of the River Ohio" (1790), and for the organization of the Territories of Indiana (1800), Illinois (1809), and Michigan (1805), all provided that the government should be similar to that established by the ordinance of 1787, for the Northwest Territory. Judges for the Northwest Territory were appointed for life.

The Act establishing the territorial government of Wisconsin (1836) directed: "That the judicial power of the said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said Territory annually, and they shall hold their offices during good behaviour."

The organization Acts for the territories of Louisiana (1804), Iowa (1838), Minnesota (1849), New Mexico (1850), Utah (1850), North Dakota (1861), Nevada (1861), Colorado (1861), and Arizona (1863), provided for judges "to serve for four years." Those for the organization of Oregon (1848), Washington (1853), Kansas (1854), Nebraska (1854), Idaho (1863), Montana (1864), Alaska (1884), Indian Territory (1889), and Oklahoma (1890), provided for judges "to serve for four years, and until their successors shall be appointed and qualified." Those for Missouri (1812), Arkansas (1819), Wyoming (1868), Hawaii (1900), and Florida (1822), provided that judges should be appointed to serve "four years unless sooner removed;" "four years unless sooner removed by

the President;" "four years unless sooner removed by the President with the consent of the Senate of the United States;" "who shall be citizens of the Territory of Hawaii and shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, and may be removed by the President;" "for the term of four years and no longer."

May 15, 1820, President Monroe approved the first general tenure of office Act, c. 102, 3 Stat. 582. If directed—

"All district attorneys, collectors of the customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land offices, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases, to be appointed under laws of the United States, shall be appointed for the term of four years, but shall be removable from office at pleasure. [Prior to this time these officers were appointed without term to serve at will.]

"Sec. 2. . . . The commission of each and every of the officers named in the first section of this Act, now in office, unless vacated by removal from office, or otherwise, shall cease and expire in the manner following: All such commissions, bearing date on or before the thirtieth day of September, one thousand eight hundred and fourteen, shall cease and expire on the day and month of their respective dates, which shall next ensue after the thirtieth day of September next; all such commissions, bearing date after the said thirtieth day of September, in the year one thousand eight hundred and fourteen, and before the first day of October, one thousand eight hundred and sixteen, shall cease and expire on the day and month of their respective dates, which shall next ensue after the thirtieth day of September, one thousand eight hundred and twenty-one. And all other such commissions shall cease

and expire at the expiration of the term of four years from their respective dates." Thus Congress not only asserted its power of control by prescribing terms and then giving assent to removals, but it actually removed officers who were serving at will under presidential appointment with consent of the Senate. This seems directly to conflict with the notion that removals are wholly executive in their nature.

XIII.

The claim advanced for the United States is supported by no opinion of this court, and conflicts with *Marbury* v. *Madison* (1803), *supra,* concurred in by all, including Mr. Justice Paterson, who was a conspicuous member of the Constitutional Convention and, as Senator from New Jersey, participated in the debate of 1789 concerning the power to remove and supported the bill to establish the Department of Foreign Affairs.

By an original proceeding here Marbury sought a mandamus requiring Mr. Madison, then Secretary of State, to deliver a commission signed by President Adams which showed his appointment (under the Act of February 27, 1801) as Justice of the Peace for the District of Columbia, "to continue in office five years." The Act contained no provision concerning removal.* As required by the circumstances the court first considered Marbury's right to demand the commission and affirmed it. Mr. Chief Justice Marshall said—

"It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the President,

*Mr. Lee (theretofore Attorney General of the United States), counsel for Marbury, distinctly claimed that the latter was appointed to serve for a definite term independent of the President's will, and upon that predicate rested the legal right which he insisted should be enforced by mandamus. Unless that right existed there was no occasion—no propriety, indeed—for considering the court's power to declare an Act of Congress invalid.

the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

"Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

"The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

"Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. [This freedom from executive interference had been affirmed by Representative Bayard in February, 1802, during the debate on repeal of the Judiciary Act of 1801.]

"To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right. . . .

"The office of justice of peace in the District of Columbia is such an office [of trust, honor, or profit] . . . . It has been created by special Act of Congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. . . .

"It is, then, the opinion of the court—1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the County of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. . . .

"It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the Secretary has received from the President for his use."

The point thus decided was directly presented and essential to proper disposition of the cause. If the doctrine now advanced had been approved there would have been no right to protect and the famous discussion and decision of the great constitutional question touching the power of the court to declare an Act of Congress without effect would have been wholly out of place. The established rule is that doubtful constitutional problems must not be considered unless necessary to determination of the cause. The sometime suggestion, that the Chief Justice indulged an *obiter dictum,* is without foundation. The court must have appreciated that unless it found Marbury had the legal right to occupy the office irrespective of the President's will there would be no necessity for passing upon the much-controverted and far-reaching power of the judiciary to declare an Act of Congress without effect. In the circumstances then existing it would have been peculiarly unwise to consider the second and more important question without first demonstrating the necessity therefor by ruling upon the first. Both points

were clearly presented by the record, and they were decided in logical sequence. *Cooley's Constitutional Limitations,* 7th ed., 231*.

But, assuming that it was unnecessary in *Marbury* v. *Madison* to determine the right to hold the office, nevertheless this Court deemed it essential and decided it. I can not think this opinion is less potential than Mr. Madison's argument during a heated debate concerning an office without prescribed tenure.

This opinion shows clearly enough why Congress, when it directed appointment of marshals for definite terms by the Act of 1789, also took pains to authorize their removal. The specification of a term without more would have prevented removals at pleasure.

We are asked by the United States to treat the definite holding in *Marbury* v. *Madison* that the plaintiff was not subject to removal by the President at will as mere *dictum*—to disregard it. But a solemn adjudication by this Court may not be so lightly treated. For a hundred and twenty years that case has been regarded as among the most important ever decided. It lies at the very foundation of our jurisprudence. Every point determined was deemed essential, and the suggestion of *dictum,* either idle or partisan exhortation, ought not to be tolerated. The point here involved was directly passed upon by the great Chief Justice, and we must accept the result unless prepared to express direct disapproval and exercise the transient power which we possess to overrule our great predecessors—the opinion cannot be shunted.

At the outset it became necessary to determine whether Marbury had any legal right which could, *prima facie* at least, create a justiciable or actual case arising under the laws of the United States. Otherwise, there would have

*At this time the power of the court to declare Acts of Congress unconstitutional was being vigorously denied. *The Supreme Court in United States History,* by Charles Warren, Vol. I.

been nothing more than a moot cause; the proceeding would have been upon an hypothesis; and he would have shown no legal right whatever to demand an adjudication on the question of jurisdiction and constitutionality of the statute. The court proceeded upon the view that it would not determine an important and far-reaching constitutional question unless presented in a properly-justiciable cause by one asserting a clear legal right susceptible of protection. It emphatically declared, not by way of argument or illustration, but as definite opinion, that the appointment of Marbury "conferred on him a legal right to the office for the space of five years," beyond the President's power to remove; and, plainly on this premise, it thereupon proceeded to consider the grave constitutional question. Indeed, if Marbury had failed to show a legal right to protect or enforce, it could be urged that the decision as to invalidity of the statute lacked force as a precedent, because rendered upon a mere abstract question raised by a moot case. The rule has always been cautiously to avoid passing upon important constitutional questions unless some controversy properly presented requires their decision.

The language of Mr. Justice Matthews in *Liverpool, etc., Steamship Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39, is pertinent—

"If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an Act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two

rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully."

Also the words of Mr. Justice Brewer in *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160, 166—"Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*. *Railroad Companies* v. *Schutte*, 103 U. S. 118, in which this court said (p. 143): 'It can not be said that a case is not authority on the point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.'"

And see—*Chicago, etc., Railway Co.* v. *Wellman*, 143 U. S. 339, 345; *United States* v. *Chamberlin*, 219 U. S. 250, 262; *United States.* v. *Title Insurance Co.*, 265 U. S. 472, 486; *Watson* v. *St. Louis, etc., Ry. Co.*, 169 Fed. 942, 944, 945.

Although he was intensely hostile to *Marbury* v. *Madison*, and refused to recognize it as authoritative, I do not find that Mr. Jefferson ever controverted the view

that an officer duly appointed for a definite time, without more, held his place free from arbitrary removal by the President. If there had been any generally-accepted opinion or practice under which he could have dismissed such an officer, as now claimed, that cause would have been a rather farcical proceeding with nothing substantial at issue, since the incumbent could have been instantly removed. And, asuming such doctrine, it is hardly possible that Mr. Jefferson would have been ignorant of the practical way to end the controversy—a note of dismissal or removal. Evidently he knew nothing of the congressional interpretation and consequent practice here insisted on. And this notwithstanding Mr. Madison sat at his side.

Mr. Jefferson's letters to Spencer Roane (1819) and George Hay (1807) give his views. "In the case of Marbury and Madison, the federal judges declared that commissions, signed and sealed by the President, were valid, although not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is as yet no deed, it is in *posse* only, but not in *esse*, and I withheld delivery of the commissions." I think it material to stop citing *Marbury* v. *Madison* as authority and have it denied to be law. "1. Because the judges, in the outset, disclaimed all cognizance of the case, although they then went on to say what would have been their opinion, had they had cognizance of it. This, then, was confessedly an extrajudicial opinion. and, as such, of no authority. 2. Because, had it been judicially pronounced, it would have been against law; for to a commission, a deed, a bond, *delivery* is essential to give validity. Until, therefore, the commission is delivered out of the hands of the executive and his agents, it is not his deed."

The judges did not disclaim all cognizance of the cause—they were called upon to determine the question

irrespective of the result reached—and, whether rightly or wrongly, they distinctly held that actual delivery of the commission was not essential. That question does not now arise—here the commission was delivered and the appointee took office.

Ex parte Hennen (1839), 13 Peters 230, 258, involved the power of a United States District Judge to dismiss at will the clerk whom he had appointed. Mr. Justice Thompson said—

"The Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. It provides, that the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour. But no tenure is fixed for the office of clerks. Congress has by law limited the tenure of certain officers to the term of four years, 3 Story, 1790; but expressly providing that the officers shall, within that term, be removable at pleasure; which, of course, is without requiring any cause for such removal. The clerks of courts are not included within this law, and there is no express limitation in the Constitution, or laws of Congress, upon the tenure of the office.

"All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

"It cannot, for a moment, be admitted, that it was the intention of the Constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment. This power of

removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was, whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution. . . .

"It would be a most extraordinary construction of the law, that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department: the President has certainly no power to remove. These clerks fall under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department. The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone. The nature of the power, and the control over the officer appointed, does not at all depend on the source from which it emanates. The execution of the power depends upon the authority of law, and not upon the agent who is to administer it. And the Constitution has authorized Congress, in certain cases, to vest this power in the President alone, in the Courts of law, or in the heads of departments; and all inferior officers appointed under each, by authority of law, must hold their office at the discretion

of the appointing power. Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held."

United States v. *Guthrie* (1854), 17 How. 284. Goodrich had been removed from the office of Chief Justice of the Supreme Court, Territory of Minnesota, to which he had been appointed to serve "during the period of four years." He sought to recover salary for the time subsequent to removal through a mandamus to the Secretary of the Treasury. The court held this was not a proper remedy and did not consider whether the President had power to remove a territorial judge appointed for a fixed term. The reported argument of counsel is enlightening; the dissenting opinion of Mr. Justice McLean is important. He points out that only two territorial judges had been removed—the plaintiff Goodrich, in 1851, and William Trimble, May 20, 1830. The latter was judge of the Superior Court of the Territory of Arkansas, appointed to "continue in office for the term of four years, unless sooner removed by the President."

United States v. *Bigler*, Fed. Cases, 14481 (1867). This opinion contains a valuable discussion of the general doctrine here involved.

United States v. *Perkins* (1886), 116 U. S. 483, 485, held that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal by such laws as Congress may enact in relation to the officers so appointed."

McAllister v. *United States* (1891), 141 U. S. 174. Plaintiff was appointed District Judge for Alaska "for the term of four years from the day of the date hereof, and until his successor shall be appointed and qualified, sub-

ject to the conditions prescribed by law." He was suspended and the Senate confirmed his successor. He sought to recover salary for the time between his removal and qualification of his successor. Section 1768, R. S., authorized the President to suspend civil officers "except judges of the courts of the United States." This court reviewed the authorities and pointed out that judges of territorial courts were not judges of courts of the United States within § 1768, and, accordingly, were subject to suspension by the President as therein provided. This argument would have been wholly unnecessary if the theory now advanced, that the President has illimitable power to remove, had been approved.

In an elaborate dissent Mr. Justice Field, Mr. Justice Gray and Mr. Justice Brown expressed the view that it was beyond the President's power to remove the judge of any court during the term for which appointed. They necessarily repudiated the doctrine of illimitable power. *Parsons* v. *United States* (1897), 167 U. S. 324, 343. After a review of the history and cases supposed to be apposite, this court, through Mr. Justice Peckham, held that the President had power to remove Parsons from the office of District Attorney, to which he had been appointed "for the term of four years from the date hereof, subject to the conditions prescribed by law." "We are satisfied that its [Congress'] intention in the repeal of the Tenure of Office sections of the Revised Statutes was again to concede to the President the power of removal if taken from him by the original Tenure of Office Act, and by reason of the repeal to thereby enable him to remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office." He referred to the Act of 1820 and suggested that the situation following it had been renewed by repeal of the Tenure of Office Act.

The opinion does express the view that by practical construction prior to 1820 the President had power to remove an officer appointed for a fixed term; but this is a clear mistake. In fact, no removals of such duly commissioned officers were made prior to 1820; and *Marbury* v. *Madison* expressly affirms that this could not lawfully be done. The whole discussion in Parson's case was futile if the Constitution conferred upon the President illimitable power to remove. It was pertinent only upon the theory that by apt words Congress could prohibit removals, and this view was later affirmed by Mr. Justice Peckham in *Shurtleff* v. *United States*. Apparently he regarded the specification of a definite term as not equivalent to positive inhibition of removal by Congress.

Reagan v. *United States* (1901), 182 U. S. 419, 425. Reagan, a Commissioner of the United States Court in Indian Territory, was dismissed by the judge, and sued to recover salary. He claimed that the judge's action was invalid because the cause assigned therefor was not one of those prescribed by law. This court, by Mr. Chief Justice Fuller, said: "The inquiry is, therefore, whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of removal. If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient. . . . The commissioners hold office neither for life, nor for any specified time, and are within the rule which treats the power of removal as incident to the power of appointment, unless otherwise provided. By chapters forty-five and forty-six, justices of the peace on conviction of the offences enumerated are removable from office, but these necessarily do not

include all causes which might render the removal of commissioners necessary or advisable. Congress did not provide for the removal of commissioners for the causes for which justices of the peace might be removed, and if this were to be ruled otherwise by construction, the effect would be to hold the commissioners in office for life unless some of those specially enumerated causes became applicable to them. We agree with the Court of Claims that this would be a most unreasonable construction and would restrict the power of removal in a manner which there is nothing in the case to indicate could have been contemplated by Congress."

Shurtleff v. United States (1903), 189 U. S. 311, 313. The plaintiff sought to recover his salary as General Appraiser. He was appointed to that office without fixed term, with consent of the Senate, and qualified July 24, 1890. The Act creating the office provided that the incumbents "shall not be engaged in any other business, avocation or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty or malfeasance in office." Shurtleff was dismissed May 3, 1899, without notice or charges and without knowledge of the reasons for the President's action. Through Mr. Justice Peckham the court said: "There is, of course, no doubt of the power of Congress to create such an office as is provided for in the above section. Under the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing. *Reagan* v. *United States,* 182 U. S. 419, 425. . . . The appellant contends that because the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded and denied the right to remove for any other cause, and that the President was

therefore by the statute prohibited from any removal excepting for the causes, or some of them therein defined. The maxim, *expressio unius est exclusio alterius*, is used as an illustration of the principle upon which the contention is founded. We are of opinion that as thus used the maxim does not justify the contention of the appellant. We regard it as inapplicable to the facts herein. The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away." The distinct recognition of the right of Congress to require notice and hearing if removal were made for any specified cause is of course incompatible with the notion that the President has illimitable power to remove. And it is well to note the affirmation that the right of removal inheres in the right to appoint.

XIV.

If the framers of the Constitution had intended "the executive power," in Art. II, Sec. 1, to include all power of an executive nature, they would not have added the carefully defined grants of Sec. 2. They were scholarly men, and it exceeds belief " that the known advocates in the Convention for a jealous grant and cautious definition of federal powers should have silently permitted the introduction of words and phrases in a sense rendering fruitless the restrictions and definitions elaborated by them." Why say, the President shall be commander-in-chief; may require opinions in writing of the principal officers in each of the executive departments; shall have power to grant reprieves and pardons; shall give information to Congress concerning the state of the union; shall receive ambassadors; shall take care that the laws be faithfully executed—if all of these things and more had already

been vested in him by the general words? The Constitution is exact in statement. *Holmes* v. *Jennison,* 14 Pet. 540. That the general words of a grant are limited when followed by those of special import is an established canon; and an accurate writer would hardly think of emphasizing a general grant by adding special and narrower ones without explanation. "An affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended." Story on the Constitution, § 448. "The powers delegated by the proposed Constitution to the federal government are few and defined." Federalist, No. XLIV. "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all. It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it." *Marbury* v. *Madison,* p. 174.

In his address to the Senate (February 16, 1835) on "The Appointing and Removing Power," Mr. Webster considered and demolished the theory that the first section of Art. II conferred all executive powers upon the President except as therein limited—Webster's Works (Little, B. & Co., 1866), vol. 4, pp. 179, 186; Debates of Congress—and showed that the right to remove must be regarded as an incident to that of appointment. He pointed out the evils of uncontrolled removals and, I think, demonstrated that the claim of illimitable executive power here advanced has no substantial foundation. The argument is exhaustive and ought to be conclusive. A paragraph from it follows: "It is true, that the Constitution declares that the executive power shall be vested in the President; but the first question which then arises is, *What is executive power? What is the degree, and what are the limitations?* Executive power is not a

thing so well known, and so accurately defined, as that the written constitution of a limited government can be supposed to have conferred it in the lump. What *is* executive power? What are its boundaries? What model or example had the framers of the Constitution in their minds, when they spoke of 'executive power'? Did they mean executive power as known in England, or as known in France, or as known in Russia? Did they take it as defined by Montesquieu, by Burlamaqui, or by De Lolme? All these differ from one another as to the extent of the executive power of government. What, then, was intended by 'the executive power'? Now, Sir, I think it perfectly plain and manifest, that, although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power, and to confer no more than they did thus define and limit. When they say it shall be vested in a President, they mean that one magistrate, to be called a President, shall hold the executive authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself."

XV.

Article I provides: "All legislative powers herein granted, shall be vested in a Congress," etc. I hardly suppose, if the words "herein granted" had not been inserted Congress would possess all legislative power of Parliament, or of some theoretical government, except when specifically limited by other provisions. Such an omission would not have overthrown the whole theory of a government of definite powers and destroyed the meaning and effect of the particular enumeration which necessarily explains and limits the general phrase. When this Article went to the Committee on Style it provided: "The legislative power shall be vested in a Congress,"

etc. The words "herein granted" were inserted by that committee September 12, and there is nothing whatever to indicate that anybody supposed this radically changed what already had been agreed upon. The same general form of words was used as to the legislative, executive and judicial powers in the draft referred to the Committee on Style. The difference between the reported and final drafts was treated as unimportant.

"That the government of the United States is one of delegated, limited and enumerated powers," and "that the federal government is composed of powers specifically granted, with the reservation of all others to the States or to the people," are propositions which lie at the beginning of any effort rationally to construe the Constitution. Upon the assumption that the President, by immediate grant of the Constitution, is vested with all executive power without further definition or limitation, it becomes impossible to delimit his authority, and the field of federal activity is indefinitely enlarged. Moreover, as the Constitution authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," it likewise becomes impossible to ascertain the extent of congressional power. Such a situation would be intolerable, chaotic indeed.

If it be admitted that the Constitution by direct grant vests the President with all executive power, it does not follow that he can proceed in defiance of congressional action. Congress, by clear language, is empowered to make all laws necessary and proper for carrying into execution powers vested in him. Here he was authorized only to appoint an officer of a certain kind, for a certain period, removable only in a certain way. He undertook to proceed under the law so far as agreeable, but repudiated the remainder. I submit that no warrant can be

found for such conduct. This thought was stressed by Mr. Calhoun in his address to the Senate, from which quotation has been made, *ante*.

XVI.

Article III provides: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." But this did not endow the federal courts with authority to proceed in all matters within the judicial power of the federal government. Except as to the original jurisdiction of the Supreme Court, it is settled that the federal courts have only such jurisdiction as Congress sees fit to confer. "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an Act of Congress to confer it." *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234.

In *Sheldon et al.* v. *Sill*, 8 How. 441, 449, it was argued that Congress could not limit the judicial power vested in the courts by the Constitution—the same theory, let it be observed, as the one now advanced concerning executive power. Replying, through Mr. Justice Grier, this court declared: "In the case of *Turner* v. *Bank of North America* [1799], 4 Dall. 10, it was contended, as in this case, that, as it was a controversy between citizens of different States, the Constitution gave the plaintiff a right to sue in the Circuit Court, notwithstanding he was an assignee within the restriction of the eleventh section of the Judiciary Act. But the court said,—'The political

truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress: and Congress is not bound to enlarge the jurisdiction of the federal courts to every subject, in every form which the Constitution might warrant.' This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in *McIntire* v. *Wood,* 7 Cranch 506; *Kendall* v. *United States,* 12 Peters 616; *Cary* v. *Curtis,* 3 Howard 245." The argument of counsel, reported in 4 Dallas, is interesting. The bad reasoning, there advanced, although exposed a hundred years ago, is back again asking for a vote of confidence.

XVII.

The Federal Constitution is an instrument of exact expression. Those who maintain that Art. II, Sec. 1, was intended as a grant of every power of executive nature not specifically qualified or denied must show that the term "executive power" had some definite and commonly accepted meaning in 1787. This court has declared that it did not include all powers exercised by the King of England; and, considering the history of the period, none can say that it had then (or afterwards) any commonly accepted and practical definition. If any one of the descriptions of "executive power" known in 1787 had been substituted for it, the whole plan would have failed. Such obscurity would have been intolerable to thinking men of that time.

Fleming v. *Page,* 9 How. 603, 618—"Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many

cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them; either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."

Blackstone, *190, 250, 252, affirms that "The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen," and that there are certain "branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers, in the execution whereof consists the executive part of government." And he defines "prerogative," as "consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent."

Montesquieu's Spirit of Laws, in 1787 the most popular and influential work on government, says: "In every government there are three sorts of power: the legislative; the executive, in respect to things dependent on the law of nations; and the executive, in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state."

Perhaps the best statement concerning "executive power" known in 1787 was by Mr. Jefferson in his Draft of a Fundamental Constitution for the Commonwealth of Virginia, proposed in 1783 (Writings, Ford's ed. 1894, vol. 3, 155–156): "The executive powers, shall be exercised by a Governor, who shall be chosen by joint ballot of both Houses of Assembly. . . . By executive powers, we mean no reference to those powers exercised under our former government by the crown as of its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give them those powers only, which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary. The application of this idea must be left to reason. We do, however, expressly deny him the prerogative powers of erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, light-houses, and sea marks; of laying embargoes, of establishing precedence, of retaining within the State, or recalling to it any citizen thereof, and of making denizens, except so far as he may be authorized from time to time by the legislature to exercise any of those powers." This document was referred to by Mr. Madison in the Federalist, No. XLVIII.

Substitute any of these descriptions or statements for the term "executive power" in Art. II, Sec. 1, and the whole plan becomes hopelessly involved—perhaps impossible.

The term "executive power" is found in most, if not all, of the state constitutions adopted between 1776 and 1787. They contain no definition of it, but certainly it was not intended to signify what is now suggested. It meant in those instruments what Mr. Webster declared it signifies in the federal Constitution—"When they say it shall be vested in a President, they mean that one magistrate, to be called a President, shall hold the execu-

tive authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself."

The Constitution of New York, much copied in the federal Constitution, declared: "The supreme executive power and authority of this State shall be vested in a Governor." It then defined his powers and duties—among them, "to take care that the laws are faithfully executed to the best of his ability." It further provided, "that the Treasurer of this State shall be appointed by Act of the Legislature;" and entrusted the appointment of civil and military officers to a council. The Governor had no power to remove them, but apparently nobody thought he would be unable to execute the laws through officers designated by another.

The Constitution of Virginia, 1776, provided: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." It then imposed upon the two Houses of Assembly the duty of selecting by ballot judges, Attorney General and Treasurer.

New Jersey Constitution, 1776—"That the Governor . . . shall have the supreme executive power . . . and act as captain-general and commander in chief of all the militia. . . . That captains, and all other inferior officers of the militia, shall be chosen by the companies, in the respective counties; but field and general officers, by the Council and Assembly."

North Carolina Constitution, 1776—"That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other. . . . That the General Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General. . . . That the General Assembly shall, by joint ballot of both houses, triennially appoint a Secretary for this State."

During the debate of 1789 Congressman Stone well said: "If gentlemen will tell us that powers, impliedly executive, belong to the President, they ought to go further with the idea, and give us a correct idea of executive power, as applicable to their rule. In an absolute monarchy there never has been any doubt with respect to implication; the monarch can do what he pleases. In a limited monarchy, the prince has powers incident to kingly prerogative. How far will a federal executive, limited by a Constitution, extend in implications of this kind? Does it go so far as absolute monarchy? Or is it confined to a restrained monarchy? If gentlemen will lay down their rule, it will serve us as a criterion to determine all questions respecting the executive authority of this government. My conception may be dull; but telling me that this is an executive power, raises no complete idea in my mind. If you tell me the nature of executive power, and how far the principle extends, I may be able to judge whether this has relation thereto, and how much is due to implication." See The Federalist, No. XLVI.

XVIII.

In any rational search for answer to the questions arising upon this record, it is important not to forget—

That this is a government of limited powers definitely enumerated and granted by a written Constitution.

That the Constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption and in view of commonly-accepted canons of construction, its history, early and long-continued practices under it, and relevant opinions of this court.

That the Constitution endows Congress with plenary powers "to establish post offices and post roads."

That, exercising this power during the years from 1789 to 1836, Congress provided for postmasters and vested the

power to appoint and remove all of them at pleasure in the Postmaster General.

That the Constitution contains no words which specifically grant to the President power to remove duly appointed officers. And it is definitely settled that he cannot remove those whom he has not appointed—certainly they can be removed only as Congress may permit.

That postmasters are inferior officers within the meaning of Art. II, Sec. 2, of the Constitution.

That from its first session to the last one Congress has often asserted its right to restrict the President's power to remove inferior officers, although appointed by him with consent of the Senate.

That many Presidents have approved statutes limiting the power of the executive to remove, and that from the beginning such limitations have been respected in practice.

That this court, as early as 1803, in an opinion never overruled and rendered in a case where it was necessary to decide the question, positively declared that the President had no power to remove at will an inferior officer appointed with consent of the Senate to serve for a definite term fixed by an Act of Congress.

That the power of Congress to restrict removals by the President was recognized by this court as late as 1903, in *Shurtleff* v. *United States*.

That the proceedings in the Constitutional Convention of 1787, the political history of the times, contemporaneous opinion, common canons of construction, the action of Congress from the beginning and opinions of this court, all oppose the theory that by vesting "the executive power" in the President the Constitution gave him an illimitable right to remove inferior officers.

That this court has emphatically disapproved the same theory concerning "the judicial power" vested in the courts by words substantially the same as those which

vest "the executive power" in the President. "The executive power shall be vested in a President of the United States of America." "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

That to declare the President vested with indefinite and illimitable executive powers would extend the field of his possible action far beyond the limits observed by his predecessors and would enlarge the powers of Congress to a degree incapable of fair appraisement.

Considering all these things, it is impossible for me to accept the view that the President may dismiss, as caprice may suggest, any inferior officer whom he has appointed with consent of the Senate, notwithstanding a positive inhibition by Congress. In the last analysis that view has no substantial support, unless it be the polemic opinions expressed by Mr. Madison (and eight others) during the debate of 1789, when he was discussing questions relating to a "superior officer" to be appointed for an indefinite term. Notwithstanding his justly exalted reputation as one of the creators and early expounders of the Constitution, sentiments expressed under such circumstances ought not now to outweigh the conclusion which Congress affirmed by deliberate action while he was leader in the House and has consistently maintained down to the present year, the opinion of this court solemnly announced through the great Chief Justice more than a century ago, and the canons of construction approved over and over again.

Judgment should go for the appellant.

MR. JUSTICE BRANDEIS, dissenting.

In 1833 Mr. Justice Story, after discussing in §§ 1537–1543 of his Commentaries on the Constitution the much debated question concerning the President's power of removal, said in § 1544:

"If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to 'inferior officers' (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases."

Postmasters are inferior officers. Congress might have vested their appointment in the head of the department.[1] The Act of July 12, 1876, c. 176, § 6, 19 Stat. 78, 80, re-enacting earlier legislation,[2] provided that "postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." That statute has been in force un-

[1] Prior to the Act of July 2, 1836, c. 270, § 33, 5 Stat. 80, 87, all postmasters were appointed by the Postmaster General. Fourth class postmasters are still appointed by him. See Acts of May 8, 1794, c. 23, § 3, 1 Stat. 354, 357; April 30, 1810, c. 37, §§ 1, 5, 28, 40, 42, 2 Stat. 592; March 3, 1825, c. 64, § 1, 4 Stat. 102; March 3, 1863, c. 71, § 1, 12 Stat. 701; July 1, 1864, c. 197, § 1, 13 Stat. 335.

[2] The removal provision was introduced specifically into the postal legislation by Act of Jan 8, 1872, c. 335, § 63, 17 Stat. 283, 292; and re-enacted, in substance, in Act of June 23, 1874, c. 456, § 11, 18 Stat. 231, 234; in the Revised Statutes, § 3830; and the Act of 1876.

modified for half a century. Throughout the period, it has governed a large majority of all civil offices to which appointments are made by and with the advice and consent of the Senate.[3] May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?

It is this narrow question, and this only, which we are required to decide. We need not consider what power the President, being Commander in Chief, has over officers in the Army and the Navy. We need not determine whether the President, acting alone, may remove high political officers. We need not even determine whether, acting alone, he may remove inferior civil officers when the Senate is not in session. It was in session when the President purported to remove Myers, and for a long time thereafter. All questions of statutory construction have been eliminated by the language of the Act. It is settled that, in the absence of a provision expressly providing for the consent of the Senate to a removal, the clause fixing the tenure will be construed as a limitation, not as a grant; and that, under such legislation, the President, acting alone, has the power of removal. *Parsons* v. *United States,* 167 U. S. 324; *Burnap* v. *United States,* 252 U. S. 512, 515. But, in defining the tenure, this statute used words of grant. Congress clearly intended to preclude a removal without the consent of the Senate.

Other questions have been eliminated by the facts found, by earlier decisions of this Court, and by the

[3] During the year ending June 30, 1913, there were in the civil service 10,543 presidential appointees. Of these 8,423 were postmasters of the first, second and third classes. Report of U. S. Civil Service Commission for 1913, p. 8. During the year ending June 30, 1923, the number of presidential appointees was 16,148. The number of postmasters of the first, second and third classes was 14,261. Report for 1923, pp. xxxii, 100.

nature of the claim made. It is settled that where the statute creating an office provides for the consent of the Senate to both appointment and removal, a removal by the President will be deemed to have been so made, if consent is given to the appointment of a successor. *Wallace* v. *United States,* 257 U. S. 541. But, in the case at bar, no successor was appointed until after the expiration of Myers' term. It is settled that if Congress had, under clause 2 of section 2, Art II, vested the appointment in the Postmaster General, it could have limited his power of removal by requiring consent of the Senate. *United States* v. *Perkins,* 116 U. S. 483. It is not questioned here that the President, acting alone, has the constitutional power to suspend an officer in the executive branch of the government. But Myers was not suspended. It is clear that Congress could have conferred upon postmasters the right to receive the salary for the full term unless sooner removed with the consent of the Senate. Compare *Embry* v. *United States,* 100 U. S. 680, 685. It is not claimed by the appellant that the Senate has the constitutional right to share in the responsibility for the removal, merely because it shared, under the Act of Congress, in the responsibility for the appointment. Thus, the question involved in the action taken by Congress after the great debate of 1789 is not before us. The sole question is whether, in respect to inferior offices, Congress may impose upon the Senate both responsibilities, as it may deny to it participation in the exercise of either function.

In *Marbury* v. *Madison,* 1 Cranch 137, 167, it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding.[4] In no

[4] In *McAllister* v. *United States,* 141 U. S. 174, 189, it was said by this Court of the decision in *Marbury* v. *Madison:* "On the contrary, the Chief Justice asserted the authority of Congress to fix the term

case, has this Court determined that the President's power of removal is beyond control, limitation, or regulation by Congress. Nor has any lower federal court ever so decided.[5] This is true of the power as it affects officers in the Army or the Navy and the high political officers like heads of departments, as well as of the power in respect to inferior statutory offices in the executive branch. Continuously for the last fifty-eight years, laws comprehensive in character, enacted from time to time with the approval of the President, have made removal from the

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of a Justice of the Peace in the District of Columbia beyond the power of the President to lessen it by removal. . . ." The same significance is attached to the decision in 1 Kent, Commentaries, 12th ed., 311, note 1.

Reverdy Johnson, who had been Attorney General, said of *Marbury* v. *Madison*, while addressing the Senate on Jan. 15, 1867, in opposition to the Tenure of Office bill: "But, says my brother and friend from Oregon, that case decided that the President had no right to remove. Surely that is an entire misapprehension. The Constitution gives to the President the authority to appoint, by and with the advice and consent of the Senate, to certain high offices, but gives to Congress the power to vest the appointment and to give the removal of inferior officers to anybody they think proper; and these justices of the peace were inferior and not high officers within the meaning of those two terms in the Constitution. Congress, therefore, by providing that such an officer should hold his commission for four years, removed the officer from the power of removal of the President, as they could have taken from him the power to appoint. Nobody doubts that if they were inferior officers, as they were, Congress might have given the power to appoint those officers to the people of the district by election, or to any individual that they might think proper, or to any tribunal other than the executive department of the Government. They had a right, although they thought proper to give it to the President himself, to provide that it should endure for four years against any such power of removal. That is all the case decided upon that question." Cong. Globe, 39th Cong., 2d sess., 461. See Note 71, *infra*.

[5] In *United States* v. *Avery*, 1 Deady 204, the statute creating the office did not prescribe a fixed tenure and there was no provision for removal only by and with the consent of the Senate. In *United States* v. *Guthrie*, 17 How. 284, 305, Mr. Justice McLean, dissenting,

great majority of the inferior presidential offices dependent upon the consent of the Senate. Throughout that period these laws have been continuously applied. We are requested to disregard the authority of *Marbury* v. *Madison* and to overturn this long established constitutional practice.

The contention that Congress is powerless to make consent of the Senate a condition of removal by the President from an executive office rests mainly upon the clause in § 1 of Article II which declares that "The executive Power shall be vested in a President." The argument is that appointment and removal of officials are executive prerogatives; that the grant to the President of "the executive Power" confers upon him, as inherent in the office, the power to exercise these two functions without restriction by Congress, except in so far as the power to restrict his exercise of them is expressly conferred

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denied that the President's power of removal was uncontrollable. In *Ex parte Hennen*, 13 Pet. 230, 238, it was stated that where the power of appointment is vested in the head of a department "the President has certainly no power to remove."

State courts have uniformly held that, in the absence of express provision in their constitution to the contrary, legislative restrictions upon the power of removal by the governor, or other appointing power, are valid as applied to persons holding statutory offices. *Commonwealth* v. *Sutherland*, 3 Serg. & R. 145, 155; *Commonwealth* v. *Bussier;* 5 Serg. & R. 451; also *Bruce* v. *Matlock*, 86 Ark. 555; *People* v. *Jewett*, 6 Cal. 291; *Gray* v. *McLendon*, 134 Ga. 224; *Dubuc* v. *Voss*, 19 La. Ann. 210; *State* v. *Cowen*, 96 Ohio St. 277; *Att'y Gen'l* v. *Brown*, 1 Wis. 513. Compare *Rankin* v. *Jauman*, 4 Ida. 53; *State* v. *Curtis*, 180 Ind. 191; *Shira* v. *State*, 187 Ind. 441; *State* v. *Henderson*, 145 Ia. 657; *Markey* v. *Schunk*, 152 Ia. 508; *State* v. *Martin*, 87 Kan. 817; *State* v. *Sheppard*, 192 Mo. 497; *State v. Sanderson*, 280 Mo. 258; *State* v. *District Court*, 53 Mont. 350; *State* v. *Archibald*, 5 N. D. 359; *State* v. *Ganson*, 58 Ohio St. 313; *Cameron* v. *Parker*, 2 Okla. 277; *Christy* v. *City of Kingfisher*, 13 Okla. 585; *State* v. *Hewitt*, 3 S. D. 187; *State* v. *Kipp*, 10 S. D. 495; *Skeen* v. *Paine*, 32 Utah 295; *State* v. *Burke*, 8 Wash. 412; *State* v. *Grant*, 14 Wyo. 41.

upon Congress by the Constitution; that in respect to appointment certain restrictions of the executive power are so provided for; but that in respect to removal, there is no express grant to Congress of any power to limit the President's prerogative. The simple answer to the argument is this: The ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been vested in some person or body. Compare *Ex parte Hennen*, 13 Pet. 230, 259. But it is not a power inherent in a chief executive. The President's power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. It is true that the exercise of the power of removal is said to be an executive act; and that when the Senate grants or withholds consent to a removal by the President, it participates in an executive act.[6] But the Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof; and it has not in terms denied to Congress the power to control removals. To prescribe the tenure involves prescribing the conditions under which incumbency shall cease. For the possibility of removal is a condition or qualification of the tenure.[7] When Congress provides that the incumbent

[6] Power to remove has been held not to be inherently an executive power in States whose constitution provides in terms for separation of the powers. See note 12 *infra;* also *Dullam* v. *Willson*, 53 Mich. 392.

[7] "If a law were to pass, declaring that district attorneys, or collectors of customs, should hold their offices four years, unless removed on conviction for misbehavior, no one could doubt its constitutional validity; because the legislature is naturally competent to prescribe the tenure of office. And is a reasonable check on the power of removal any thing more than a qualification of the tenure of office?" Webster, Feb. 16, 1835, 4 Works, 8th ed., 197.

"It is the legislative authority which creates the office, defines its duties, and may prescribe its duration. I speak, of course, of offices

shall hold the office for four years unless sooner removed with the consent of the Senate, it prescribes the term of the tenure.

It is also argued that the clauses in Article II, § 3, of the Constitution, which declare that the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States" imply a grant to the President of the alleged uncontrollable power of removal. I do not find in either clause anything which supports this claim. The provision that the President "shall Commission all the Officers of the United States" clearly bears no such implication. Nor can it be spelled out of the direction that "he shall take Care that the Laws be faithfully executed." There is no express grant to the President of incidental powers resembling those conferred upon Congress by clause 18 of Article I, § 8. A power implied on the ground that it is inherent in the executive, must, according to established principles

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not created by the constitution, but the law. The office, coming into existence by the will of Congress, the same will may provide how, and in what manner, the office and the officer shall both cease to exist. It may direct the conditions on which he shall hold the office, and when and how he shall be dismissed." Clay, Feb. 18, 1835, 11 Cong. Deb. 518.

"Congress shall have power to make all laws, not only to carry into effect the powers expressly delegated to itself, but those delegated to the Government, or any department or office thereof; and of course comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows, of course, to whatever express grant of power to the Executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the constitution cited, from the Executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best." Calhoun, Feb. 20, 1835, 11 Cong. Deb. 553.

of constitutional construction, be limited to "the least possible power adequate to the end proposed." Compare *Marshall* v. *Gordon*, 243 U. S. 521, 541; *Michaelson* v. *United States*, 266 U. S. 42, 66. The end to which the President's efforts are to be directed is not the most efficient civil service conceivable, but the faithful execution of the laws consistent with the provisions therefor made by Congress. A power essential to protection against pressing dangers incident to disloyalty in the civil service may well be deemed inherent in the executive office. But that need, and also insubordination and neglect of duty, are adequately provided against by implying in the President the constitutional power of suspension.[8] Such provisional executive power is comparable to the provisional judicial power of granting a restraining order without notice to the defendant and opportunity to be heard. Power to remove, as well as to suspend, a high political officer, might conceivably be deemed indispensable to democratic government and, hence, inherent in the President. But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government.

To imply a grant to the President of the uncontrollable power of removal from statutory inferior executive offices involves an unnecessary and indefensible limitation upon the constitutional power of Congress to fix the tenure of inferior statutory offices. That such a limitation cannot be justified on the ground of necessity is demonstrated by the practice of our governments, state and national. In none of the original thirteen States did the chief executive

[8] See Debate of 1789 (June 17), Stone: "All the difficulties and embarrassments that have been mentioned, can be removed by giving to the President the power of suspension during the recess of the Senate; and I think that an attention to the Constitution will lead us to decide that this is the only proper power to be vested in the President of the United States." 1 Ann. Cong. 495; also Gerry, 1 Ann. Cong. 504; Sherman, 1 Ann. Cong. 492; Jackson, 1 Ann. Cong. 489.

possess such power at the time of the adoption of the Federal Constitution. In none of the forty-eight States has such power been conferred at any time since by a state constitution,[9] with a single possible exception.[10] In a few States the legislature has granted to the governor, or other

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[9] New York: Constitution of 1777, amended 1801. The powers of appointment and removal were vested in the Council of Appointment. *People* v. *Foot,* 19 Johns. 58. By later constitutions or amendments varying restrictions were imposed on the governor's power of removal. 4 Lincoln, Constitutional History of New York, 554–594, 724–733. Massachusetts: Constitution of 1780. Appointments to be made by governor with the advice and consent of the council. No express provision for removals. By early practice the council was associated with the governor in removals. The Constitutional Amendment of 1855 altering the manner of appointment left the practice as to removals unchanged. *Opinion of the Justices,* 3 Gray 601, 605. New Hampshire: Constitution of 1784. Provision and practice the same as Massachusetts. By Laws of 1850, c. 189, § 4, the legislature further limited the governor's power of removal over certain inferior offices. New Jersey: Constitution of 1776. The "supreme executive power" of the governor was limited to commissioning officers appointed by the council and assembly. Pennsylvania: Constitution of 1790. Appointing power vested in the governor alone. In the absence of restrictive legislation he exercised the power of removal. Biddle, Autobiography, 283. Control by the legislature of his power of removal from inferior offices, had early judicial sanction. *Commonwealth* v. *Sutherland,* 3 Serg. & R. 145. Maryland: The governor seems to have had such power under the constitution of 1776, but it was later taken away. The Constitutional Convention of 1851 considered but refused to grant the governor the sole power of removal. *Cull* v. *Wheltle,* 114 Md. 58, 80. Illinois: Constitution of 1818 was construed as denying the power of removal to the governor acting alone. *Field* v. *People,* 2 Scam. 79. The Constitution of 1870, Art. 5, § 12, conferred the power, but only for certain specified causes. In Maine and Florida, concurrent action of the senate is a constitutional requirement. *Opinion of the Justices,* 72 Me. 542; *Advisory Opinion to the Governor,* 69 Fla. 508.

[10] The Pennsylvania Constitution of 1873 provided that "appointed officers . . . may be removed, at the pleasure of the power by which they shall have been appointed." Art. VI, § 4. The Supreme Court held as to petty officers or subordinate ministerial agents

appointing power, the absolute power of removal.[11] The legislative practice of most States reveals a decided tendency to limit, rather than to extend, the governor's power of removal.[12] The practice of the Federal Government will be set forth in detail.

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appointed by the governor, that his power of removal is controllable; and that a statute prohibiting removal except for specified causes is valid. *Commonwealth* v. *Black,* 201 Pa. St. 433. Officials deemed agents of the legislature are also held to be without the scope of the governor's power of removal. *Commonwealth* v. *Benn,* 284 Pa. St. 421.

[11] Oregon has by statute conferred a general power of removal upon the governor. 1920 Olson's Oregon Laws, § 4043. Vermont had also vested the power of removal with the governor. 1917 Vt. Gen. Laws, § 356. It later, however, placed restrictions upon the governor's power of removing members of the State Board of Education. 1917 Vt. Gen. Laws, § 1170. See Wyoming Act of Feb. 20, 1905, c. 59, *State* v. *Grant,* 14 Wyo. 41, 59–60. Compare *State* v. *Peterson,* 50 Minn. 239; *State* v. *Hawkins,* 44 Ohio St. 98.

[12] By statute, in some States, removals can be made only upon concurrence of the senate or legislature with the governor. 1914 Ga. Civ. Code, § 2618; 1924 Ia. Code, § 315; N. Y. Consol. Laws, c. 47, § 32; 1921 Throckmorton Ohio Gen. Code, § 13; 1913 Pa. Laws, 1374, 1401; 1923 R. I. Gen Laws, § 384; 1924 Va. Code, § 330. In some, the governor is required merely to record his reasons for dismissal. Conn. Rev. Stats. § 86; 1905 Wyo. Laws, c. 59. In many States, the power of removal is limited by statute to specific instances of misconduct or misbehavior in office. 1921 Colo. Comp. Laws, § 138; Carroll's Ky. Stats. § 3750; 1915 Mich. Comp. Laws, §§ 243, 252 (during recess of legislature only); 1913 N. D. Comp. Laws, § 685; 1910 Okla. Rev. Stats. § 8052; 1919 S. D. Rev. Code, §§ 7009, 7010; 1917 Utah Comp. Laws, § 5684 (during recess of legislature only); 1893 Wash. Laws, c. 101. In addition, a statement of record of the reasons for dismissal is often required. 1913 Ariz. Civ. Code, § 247 (inspector of apiaries), § 4757, (board of dental examiners), § 4769 (board of embalmers); 1914 Ga. Code, § 1697(b) (board of medical examiners), § 1963 (state geologist); 1919 Ida. Comp. Stats. § 793 (board of education), § 2398 (utility commissioners); 1855 La. Acts, No. 297, § 13 (public weighers); 1910 Md. Laws, c. 180, § 2 (utility commissioners); 1923 Minn. Gen. Stats. § 2229 (tax officers), § 2356 (tax commission); 1912 Nev. Rev. Laws, § 4432 (dental examiners);

Over removal from inferior civil offices, Congress has, from the foundation of our Government, exercised continuously some measure of control by legislation. The instances of such laws are many. Some of the statutes were directory in character. Usually, they were mandatory. Some of them, comprehensive in scope, have endured for generations. During the first forty years of our Government, there was no occasion to curb removals.[13] Then, the power of Congress was exerted to ensure removals. Thus, the Act of September 2, 1789, c. 12, 1 Stat. 65, 67, establishing the Treasury Department, provided by § 8 that if any person appointed to any office by that Act should be convicted of offending against any of its provisions, he shall "upon conviction be removed from office." The Act of March 3, 1791, c. 18, § 1, 1 Stat. 215, extended the provision to every clerk employed in the Depart-

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1910 N. Y. Laws, c. 480, § 4 (Public Service Commission); 1921 N. Y. Laws, c. 134 (transit commission); 1921 Throckmorton Ohio Gen. Laws, § 88 (board of clemency), § 488 (utility commissioners), § 486–3 (civil service commissioners), § 710–6 (superintendent of banks), § 744–16 (commissioner of securities), § 871–2 (industrial commission), § 1337 (board of embalming examiners), § 1465–2 (tax commission); 1917 Vt. Gen. Laws, § 1170 (board of education). In other States, or for other officers, the laws require the existence of "cause" or provide for notice and hearing. 1919 Mo. Rev. Stat. § 10414 (utility commissioners); 1921 Mont. Pol. Code, § 2820 (industrial accident commission); N. Y. Consol. Laws, c. 46, § 33 (officials appointed by governor alone); 1921 Throckmorton Ohio Gen. Laws, § 1236–4 (board of health), § 1380 (commissioners of state laws); 1920 Tex. Comp. Stats. Art. 4995b (board of water engineers), Art. 6027 (appointees of governor), Art. 6195 (board of prison commissioners), Art. 6286 (board of pharmacy); 1923 Wis. Stats. § 17.07 (appointees of governor). Some statutes make removal dependent upon the recommendation of a board. 1920 Tex. Comp. Stats. Art. 5927 (mining inspectors).

[13] Removals made from 1789 to 1829 of Presidential appointees, exclusive of military officers, were as follows: Washington—17, Adams—19, Jefferson—62, Madison—24, Monroe—27, J. Q. Adams—7, being a total of 156. Fish, Removal of Officials, 1899 Am. Hist.

ment. The Act of May 8, 1792, c. 37, § 12, 1 Stat. 279, 281, extended it further to the Commissioner of the Revenue and the Commissioners of Loans, presidential appointments. The first Tenure of Office Act, May, 15, 1820, c. 102, 3 Stat. 582, introduced the four-year term, which was designed to ensure removal under certain conditions.[14] The Act of January 31, 1823, c. 9, § 3, 3 Stat. 723, directed that officers receiving public money and failing to account quarterly shall be dismissed by the President unless they shall account for such default to his satisfaction. The Act of July 2, 1836, c. 270, §§ 26, 37, 5 Stat. 80, 86, 88, which first vested the appointment of postmasters in the President by and with the advice and consent of the Senate, directed that postmasters and others offending against certain prohibitions "be forthwith dismissed from office;" and as to other offences pro-

Ass'n Rep. 67. Compare Sen. Rep. No. 576, 47th Cong., 1st sess., Ser. No. 2006, p. iv. "It was the intention of the founders of our Government that administrative officers should hold office during good behavior. . . . Madison, the expounder of the Constitution, said that the wanton removal of a meritorious officer was an impeachable offense. It was the established usage without question or variation during the first forty years of our Government to permit executive officers, except members of the Cabinet, to hold office during good behavior, and this practice was only changed by the four-year tenure act of 1820, which was passed at the instance of an appointing officer for the purpose of using this power to secure his nomination as a Presidential candidate." Report of U. S. Civil Service Commission for 1896, pp. 28–29.

[14] Fish, Civil Service and Patronage, 66–70. Madison, in commenting upon the Four Year Limitation Act of 1820 to President Monroe, recognized the necessary identity of a power to prescribe qualifications of tenure and a power to remove from office. "Is not the law vacating periodically the described offices an encroachment on the Constitutional attributes of the Executive? . . . If a law can displace an officer at every period of four years, it can do so at the end of every year, or at every session of the Senate; and the tenure will then be the pleasure of the Senate as much as of the President, and not of the President alone." 3 Letters and Writings, 200.

vided for such dismissal upon conviction by any court. The Act of July 17, 1854, c. 84, § 6, 10 Stat. 305, 306, which authorized the President to appoint registers and receivers, provided that " on satisfactory proof that either of said officers, or any other officer, has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office." [15]

In the later period, which began after the spoils system had prevailed for a generation,[16] the control of Congress over inferior offices was exerted to prevent removals. The removal clause here in question was first introduced by the Currency Act of February 25, 1863, c. 58, § 1, 12 Stat. 665, which was approved by President Lincoln. That statute provided for the appointment of the Comp-

[15] The provisions of the Acts of 1789, 1791, 1792, 1836 and 1854, were reenacted in the Revised Statutes and are still in force. Rev. Stats. §§ 243, 244, 2242, 3947, as amended. Mandatory directions of dismissal for specified offenses are also contained in the Act of Mar. 2, 1867, c. 172, § 3, 14 Stat. 489, 492, reenacted in Rev. Stats. § 1546; Act of Feb. 1, 1870, c. 11, 16 Stat. 63, reenacted in Rev. Stats. § 1784; and Act of Aug. 15, 1876, c. 287, § 6, 19 Stat. 143, 169. From the operation of the latter Act executive officers and employees appointed by the President by and with the advice and consent of the Senate are significantly excepted.

[16] Removals made from 1829 to 1869 of Presidential appointees, exclusive of military officers, were as follows: Jackson—180, Van Buren—43, Harrison and Tyler—389, Polk—228, Taylor—491, Fillmore—73, Pierce—771, Buchanan—253, Lincoln—1400, Johnson—726, being a total of 4,554. Fish, Removal of Officials, 1899 Am. Hist. Ass'n Rep. 67. The great increase in removals under President Jackson included offices besides those to which appointments were made by the President and Senate, the accepted estimate during the first year of his administration being 2,000. 2 Story, Constitution, § 1543; House Rep, No. 47, 40th Cong., 2d sess., Ser. No. 1352, p. 8. Of these 491 were postmasters. 1 Am. State Papers, Post Office, 242. The increase in the number of such removals is testified to by the incomplete reports of the following years. The Post Office Department consistently suffered most. See Lucy Salmond, History of the Appointing Power, 1 Am. Hist. Ass'n Papers, No. 5, pp. 67–86.

troller, and that he "shall hold his office for the term of five years unless sooner removed by the President, by and with the advice and consent of the Senate." In 1867 this provision was inserted in the Tenure of Office Act, March 2, 1867, c. 154, §§ 1, 3, 6, 14 Stat. 431, which applied, in substance, to all presidential offices. It was passed over President Johnson's veto.[17] In 1868, after the termination of the impeachment proceedings, the removal clause was inserted in the Wyoming Act of July 25, 1868, c. 235, §§ 2, 3, 9, 10, 15 Stat. 178–181, which was approved by President Johnson.

By Act of June 8, 1872, c. 335, 17 Stat. 283, a consolidation and revision of the postal laws was made. The removal clause was inserted in § 63 in the precise form in which it had first appeared in the Currency Act of 1863. From the Act of 1872, it was carried as § 3830 into Revised Statutes, which consolidated the statutes in force December 1, 1873. The Act of 1872 was amended by the Act of June 23, 1874, c. 456, § 11, 18 Stat. 231, 234, so as to reduce the classes of postmasters, outside New York City, from five to four. The removal clause was again inserted. When the specific classification of New York City in § 11 of the Act of 1874, was repealed by the Act of July 12, 1876, c. 179, § 4, 19 Stat. 80, the removal clause was retained. Thus, postmasters of the first three classes were made, independently of the Tenure of Office Act, subject to the removal clause. Each of these postal statutes was approved by President Grant. When President Cleveland secured, by Act of March 3, 1887, c. 353, 24 Stat. 500, the repeal of §§ 1767 to 1772 of Revised Statutes (which had re-enacted as to all presidential offices the removal provision of the Tenure of Office Act) he made no attempt to apply the repeal to postmasters, although postmasters constituted then, as they have ever since, a large majority of all presidential appointees. The removal clause, which

[17] It was amended by Act of April 5, 1869, c. 10, 16 Stat. 6.

had become operative as to them by specific legislation, was continued in force. For more than half a century this postal law has stood unmodified. No President has recommended to Congress that it be repealed. A few proposals for repeal have been made by bills introduced in the House. Not one of them has been considered by it.[18]

It is significant that President Johnson, who vetoed in 1867 the Tenure of Office Act which required the Senate's consent to the removal of high political officers, approved other acts containing the removal clause which related only to inferior officers. Thus, he had approved the Act

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[18] On Feb. 8, 1887, while the bill for the repeal of the Tenure of Office Act was pending, the Committee on Post Offices and Post Roads reported a bill, H. R. 11108, for reclassifying postmasters into three classes, and provided (§ 1) that: "Postmasters of the first and second classes shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years, subject to the provisions of law respecting their removal or suspension, and the filling of vacancies occurring when the Senate shall not be in session. . . . Postmasters of the third class shall be appointed and commissioned by the Postmaster General, and hold their offices during his pleasure." 18 Cong. Rec. 1498. The bill was not considered by Congress.

On Jan. 5, 1892, Sherman Hoar introduced a bill (H. R. 196) to provide that all postmasters should hold office during good behavior 23 Cong. Rec. 130. § 1 contained the following proviso: "Provided, however, That the President may at any time remove or suspend a postmaster for cause stated." On Dec. 22, 1895, De Forest introduced H. R. 8328, 27 Cong. Rec. 576. Section 2 provided: "That postmasters of all classes now in office or hereafter to be appointed shall be appointed to hold their offices for good behavior; *Provided*, That the President may at any time remove or suspend a postmaster of the first, second or third class for cause, communicated in writing to the Senate at the next subsequent session of Congress after such removal, and that the Postmaster General may at any time remove or suspend a postmaster of the fourth class for cause, communicated in the letter of removal." Sec. 3 forbade appointment, removal or suspension for political reasons. On Jan. 28, 1896, Gillett introduced the identical bill (H. R. 8328). 28 Cong. Rec. 1061. None of these three bills was considered even by a committee.

of July 13, 1866, c. 176, § 5, 14 Stat. 90, 92, which provided that "no officer in the military or naval service shall in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." [19] And in 1868 he approved the Wyoming Act, which required such consent to the removal of inferior officers who had been appointed for fixed terms. It is significant also that the distinction between high political officers and inferior ones had been urged in the Senate in 1867 by Reverdy Johnson, when opposing the passage of the Tenure of Office Act.[20] It had apparently been recognized in 1789 at the time of the great debate in the First Congress, and by Chief Justice Marshall in 1807.[21]

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[19] This provision was reenacted by Rev. Stats. § 1229. Comp. Sen. Rep. Apr. 4, 1864, No. 42, 38th Cong. 1st sess., Ser. No. 1178. In *Blake* v. *United States*, 103 U. S. 227, 237, this provision was interpreted as not denying "the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places." The Act of June 4, 1920, c. 227, Art. 118, 41 Stat. 759, 811, provides:

"ART. 118. OFFICERS, SEPARATION FROM SERVICE.—No officer shall be discharged or dismissed from the service, except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction."

[20] See Note 4, p. 242, *supra*.

[21] See Lawrence, June 17, 1 Ann. Cong. 483–484; Smith, June 17, 1 Ann. Cong. 508–9; Madison, June 18, 1 Ann. Cong., 547–8. A few days subsequent to the debate on the removal provision in the Act establishing a Department of Foreign Affairs, Madison, although he believed that the power to prescribe the tenure of office and the power of removal were in essence the same, moved to amend the Act establishing a Treasury Department by providing that the Comptroller should hold office for a limited period of years. To the objection that such a provision was not within the power of Con-

It had been repeatedly pointed out in later years.[22]

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gress he replied: "When I was up before . . . I endeavored to show that the nature of this office differed from the others upon which the House had decided; and, consequently, that a modification might take place, without interfering with the former distinction; so that it cannot be said we depart from the spirit of the Constitution." 1 Ann. Cong. 614. Stone, in support of Madison, added: "As the Comptroller was an inferior officer, his appointment might be vested in the President by the Legislature; but, according to the determination which had already taken place, it did not necessarily follow that he should have the power of dismissal; and before it was given, its propriety ought to be apparent." 1 Ann. Cong. 613. See Note 71, *infra*.

[22] In 1830, Senator Barton, in defense of his resolutions denying an uncontrollable Presidential power of removal, said: "It is no question whether a President may remove, at his own will and pleasure, his Secretary of State. That was the very question before Congress in the great debate of 1789. . . . Nobody would wish to force a disagreeable member of the cabinet on the President. . . . But the class of officers now before the Senate, and their predecessors, attempted to be removed by the President, were not under consideration in the debate of 1789. This is a class of public officers—or officers of the law—whose term, tenure, and duties of office are fixed and prescribed by the laws of the land, and not by the Executive will, as in the other class. . . . The power is now boldly asserted on this floor by the majority, for the first time since the foundation of the republic, of removing this class of federal officers by the President at discretion, without the slightest restraint by the Senate." 6 Cong. Deb. 458–459. The same distinction was taken in 1835, by Senators Wright and White, in the debate on the Executive Patronage Bill. 11 Cong. Deb. 480, 487.

On June 15, 1844, the Senate Committee on Retrenchment dealing with the evils of executive patronage said: "It will be sufficient for the committee to show that Congress may regulate, by law, as well the power to appoint inferior officers as to remove them. . . . The committee will not protract the argument. It is not known to them that the power of Congress to regulate the appointment and removal of inferior officers has been questioned. It is very certain that the authority of the President to control the departments in the exercise of the power has not at any time been recognised by law." Sen. Doc. No. 399, 28th Cong. 1st sess., Ser. No. 437, p. 29–30.

The administrative action of President Johnson under the Tenure of Office Act indicates likewise a recognition of this distinction between inferior and high political offices. The procedure prescribed in § 2 required of the President a report to the Senate of the reasons for a suspension and also made its consent essential to a removal. In respect to inferior officers this course appears to have been scrupulously observed by the President in every case. This is true for the period before the institution of the impeachment proceedings [23] as well as for the later period.[24] On the other hand, in the case of a high political officer, Secretary of War Stanton, President Johnson declined on several grounds to follow the procedure prescribed by the Act. 16 Ex. Journ. 95. The requirement that the President should report reasons for suspension to the Senate was not retained by the amended Tenure of Office Act of April 5, 1869, c. 10, 16 Stat. 6; the other provisions, however, were substantially reenacted; and affirmative evidence of compliance by succeeding Presidents with its requirements as to inferior officers is recorded between 1869 and the repeal of the Act in 1887. Suspensions and not removals were made during recess.[25] In those rare instances where removals

[23] In six instances President Johnson in separate messages communicated his reasons for suspension. 16 Ex. Journ. 3, 109–110, 122, 133. In two further instances misconduct was given as the ground for suspension. 16 *ibid.* 1.

[24] Five cases of this nature are on record. 16 Ex. Journ. 411–412.

[25] From President Grant's administration to the close of the first two years of President Cleveland's first administration, nominations of officials to succeed those who had been suspended during the recess follow one of two forms: "I nominate A. B., who was designated during the recess of the Senate, to be —, vice C. D. suspended," or "I nominate A. B. to be postmaster at — in place of C. D., suspended under the provisions of the seventeen hundred and sixty-eighth section of the Revised Statutes of the United States." These forms are not used after Mar. 3, 1887. The case of A. C. Botkin, marshal of Montana Territory, is illustrative of the fact that suspension and not removal could be effected during the recess. On Jan.

were sought by means other than the appointment of a "successor," Presidents Grant, Hayes, Garfield and Arthur requested the Senate's consent to the removals.[26] Where the Senate failed to confirm the nomination of a successor, the former incumbent retained office until either the expiry of his commission or the confirmation of a successor.[27]

28, 1885, President Arthur nominated E. A. Kreidler in place of A. C. Botkin to be removed. 24 Ex. Journ. 425. The Senate failed to act upon the nomination and on Dec. 21, 1885, President Cleveland nominated R. S. Kelly vice A. C. Botkin suspended. For several months action upon the nomination was delayed and on April 28, 1886, the President sent the following message to the Senate: "I nominated Robert S. Kelly, of Montana, to the Senate on the 21st day of December, 1885. . . . in the place of A. C. Botkin, who was by me suspended under the provisions of section 1708 of the Revised Statutes. On the 12th day of April, 1886, the term of office for which said A. C. Botkin was originally appointed expired: And I renew the nomination of Robert S. Kelly, of Montana . . . in the place of the said A. C. Botkin, whose term of office has so expired as aforesaid." 25 Ex. Journ. 441. These years of President Cleveland disclose 78 other cases of a similar nature. 25 *ibid.* 396–410, 426, 436, 441, 488, 490–494, 497, 501, 516, 539, 563, 714–715.

[26] On Dec. 6, 1869, President Grant requested the consent of the Senate to the removal of certain Indian agents, to whose posts army officers had been assigned. 17 Ex. Journ. 289. On May 17, 1872, the Senate gave its consent to the removal of T. H. Bazin, appraiser of merchandise at Charleston, S. C., 18 *ibid.* 251. On Dec. 4, 1878, President Hayes requested the Senate's consent to the removal of A. M. Devereux, a third lieutenant in the revenue service. 21 *ibid.* 393. The Senate during that session took no action. To the three succeeding sessions of the Senate the same request was made without securing its consent. 22 *ibid.* 23, 108, 410. President Garfield likewise made the same request but failed to secure any action by the Senate. 23 *ibid.* 9, 29. On April 15, 1884, President Arthur recommended to the Senate the removal of F. N. Wicker as collector of customs at Key West. 24 *ibid.* 246. The Senate concurred in his removal without expressing an opinion upon the constitutional powers of the President and Senate upon the subject of removal. 24 *ibid.* 249.

[27] The instances are numerous and a few illustrations will suffice. On Mar. 2, 1883, Paul Strobach was nominated as a marshal vice

From the foundation of the Government to the enactment of the Tenure of Office Act, during the period while it remained in force, and from its repeal to this time, the administrative practice in respect to all offices has, so far as appears, been consistent with the existence in Congress of power to make removals subject to the consent of the Senate.[28] The practice during the earlier period was described by Webster in addressing the Senate on February 16, 1835:

"If one man be Secretary of State, and another be appointed, the first goes out by the mere force of the ap-

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M. C. Osborn to be removed. 23 Ex. Journ. 711. The Senate took no action during that session and in the recess Osborn was suspended. Strobach was again nominated but was rejected at the next session of the Senate. Thereupon on May 8, 1884, J. H. Speed was nominated "vice Paul Strobach, temporarily appointed during the recess of the Senate." 24 Ex. Journ. 265. Pending action upon the nomination President Arthur on May 14, 1884, again nominated J. H. Speed "vice M. C. Osborn, whose term has expired. This nomination is made to correct an error in the nomination of Joseph H. Speed to the above-named office, which was delivered to the Senate on the 8th instant, and which is hereby withdrawn." 24 Ex. Journ. 267. The correction expressly recognizes that Osborn had never ceased to hold office. Compare 15 Op. A. G. 375. Again, on Mar. 2, 1884, Windus was nominated as a postmaster vice Lambert "whose removal for cause is hereby proposed." 24 Ex. Journ. 220. The Senate rejected Windus, and on Dec. 17, 1885, President Cleveland nominated Gildea vice Lambert "whose commission expired May 13, 1885." 25 *ibid.* 228. On Jan. 6, 1885, Richardson was nominated as a postmaster vice Corson "whose removal for cause is hereby proposed." 24 *ibid.* 412. The Senate failed to act upon the nomination, and on April 1, 1885, Cleveland nominated Bonner to the post vice Corson "whose removal for cause is hereby proposed." 25 *ibid.* 45.

[28] Since the enactment of the Tenure of Office Act various forms have been used to nominate officials to succeed those whose removal is thereby sought. Examination of their use over a period of thirty-two years indicates that no significance is to be attached to the use of any particular form. Thus the nomination is sometimes in the form A. B. vice C. D. "removed"; sometimes it is "to be removed";

pointment of the other, without any previous act of removal whatever. And this is the practice of the government, and has been, from the first. In all the removals which have been made, they have generally been effected simply by making other appointments. I cannot find a case to the contrary. There is no such thing as any distinct official act of removal. I have looked into the practice, and caused inquiries to be made in the departments, and I do not learn that any such proceeding is known as an entry or record of the removal of an officer from office; and the President could only act, in such cases, by causing some proper record or entry to be made, as proof of the

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sometimes "removed for cause"; sometimes "whose removal for cause is hereby proposed."

	"removed"	"to be removed"	"removed for cause"	"whose removal for cause is hereby proposed"
1867–1869 (Johnson)	37	72	3	
1869–1873 (Grant)	468	464	17	
1873–1877 (Grant)	120	144	19	
1877–1881 (Hayes)	8	102	10	42
1881 (Garfield)	1			19
1881–1885 (Arthur)	4	78		69
1885–1887 (Cleveland)	15	19		24
1887–1889 (Cleveland)	178	1		
1889–1893 (Harrison)	1080	118	9	
1893–1897 (Cleveland)	808	101		
1897–1899 (McKinley)	813	26		

Postmasters will be found included within all these categories. 16–31 Ex. Journ., *passim*. The form "who has been removed" was twice used by President Grant and once by President Harrison. On one occasion President Grant used the form "whom I desire to remove," and on six occasions President Hayes used the form "to be thus removed." The simple form "removed," which has been exclusively used for postmasters since 1887, does not imply that removal has already been accomplished. That form was used in the Parsons and Shurtleff cases, where the notification of removal sent to the incumbent stated that the removal would take effect upon the qualification of a successor. 29 Ex. Journ. 11; 31 *ibid.* 1328.

fact of removal. I am aware that there have been some cases in which notice has been sent to persons in office that their services are, or will be, after a given day, dispensed with. These are usually cases in which the object is, not to inform the incumbent that he is *removed*, but to tell him that a successor either is, or by a day named will be, appointed." 4 Works, 8th ed., 189.

In 1877, President Hayes, in a communication to the Senate in response to a resolution requesting information as to whether removals had been made prior to the appointment of successors, said:

"In reply I would respectfully inform the Senate that in the instances referred to removals had not been made at the time the nominations were sent to the Senate. The form used for such nominations was one found to have been in existence and heretofore used in some of the Departments, and was intended to inform the Senate that if the nomination proposed were approved it would operate to remove an incumbent whose name was indicated. R. B. Hayes." 7 Messages and Papers of the President, 481.

Between 1877 and 1899, the latest date to which the records of the Senate are available for examination, the practice has, with few exceptions, been substantially the same.[29] It is, doubtless, because of this practice, and the long settled rule recently applied in *Wallace* v. *United States*, 257 U. S. 541, 545, that this Court has not had occasion heretofore to pass upon the constitutionality of the removal clause.

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[29] Cases in this Court dealing with the removal of civil officers, appointed by the President with the advice and consent of the Senate, illustrate the practice of securing their removal by the appointment of a successor. In recent years the formal notification of removal commonly reads: "Sir: You are hereby removed from the office of —, to take effect upon the appointment and qualification of your successor." *Parsons* v. *United States*, 167 U. S. 324, 325; *Shurtleff* v. *United States*, 189 U. S. 311, 312.

The practice of Congress to control the exercise of the executive power of removal from inferior offices is evidenced by many statutes which restrict it in many ways besides the removal clause here in question. Each of these restrictive statutes became law with the approval of the President. Every President who has held office since 1861, except President Garfield, approved one or more of such statutes. Some of these statutes, prescribing a fixed term, provide that removal shall be made only for one of several specified causes.[30] Some provide a fixed term, subject generally to removal for cause.[31] Some pro-

[30] Provisions authorizing removal for

(a) Inefficiency, neglect of duty, malfeasance in office, but for no other cause: Act of May 27, 1908, c. 205, § 3, 35 Stat. 403, 406, amending Act of June 10, 1890, c. 407, § 12, 26 Stat. 131, 136, Board of General Appraisers; Act of July 15, 1913, c. 6, § 11, 38 Stat. 103, 108, Commissioner of Mediation and Conciliation (misconduct in office only); Act of June 2, 1924, c. 234, § 900b, 43 Stat. 253, 336, Board of Tax Appeals.

(b) Neglect of duty or malfeasance in office, but for no other cause: Act of Feb. 28, 1920, c. 91, § 306(b), 41 Stat. 456, 470, Railroad Labor Board; Act of Sept. 22, 1922, c. 412, § 1, 42 Stat. 1023, amended by Act of Mar. 4, 1923, c. 248, § 1, 42 Stat. 1446, United States Coal Commission.

(c) Inefficiency, neglect of duty, malfeasance in office, not restricting, however, under *Shurtleff* v. *United States,* 189 U. S. 311, the President's power to remove for other than the causes specified: Act of Feb. 4, 1887, c. 104, § 11, 24 Stat. 379, 383, Interstate Commerce Commission; Act of June 10, 1890, c. 407, § 12, 26 Stat. 131, 136, Board of General Appraisers; Act of Sept. 26, 1914, c. 311, § 1, 38 Stat. 717, 718, Federal Trade Commission; Act of Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729, United States Shipping Board; Act of Sept. 8, 1916, c. 473, § 700, 39 Stat. 756, 795, United States Tariff Commission.

[31] Act of June 7, 1878, c. 162, § 1, 20 Stat. 100, justices of the peace of the District of Columbia; Act of June 6, 1900, c. 786, § 10, 31 Stat. 321, 325, governor, surveyor-general, attorneys, marshals of Alaska; Act of Aug. 24, 1912, c. 389, § 6, 37 Stat. 539, 555, removals from the classified civil service to be only for such cause as will promote the efficiency of the service and for reasons stated in writing; Act of

vide for removal only after hearing.[32] Some provide a fixed term, subject to removal for reasons to be communicated by the President to the Senate.[33] Some impose the restriction in still other ways. Thus, the Act of August 24, 1912, c. 389, § 6, 37 Stat. 539, 555, which deals only with persons in the classified civil service, prohibits removal "except for such cause as will promote the efficiency of the service and for reasons given in writing," and forbids removal for one cause which had theretofore been specifically prescribed by President Roosevelt and President Taft as a ground for dismissal.[34] The Budget

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July 17, 1916, c. 245, § 3, 39 Stat. 360, Federal Farm Loan Board; Act of June 3, 1922, c. 205, 42 Stat. 620, Federal Reserve Board. The provision is also common with respect to judgeships. Act of Mar. 19, 1906, c. 960, § 1, 34 Stat. 73 (Juvenile Court of the District of Columbia); Act of June 30, 1906, c. 3934, § 7, 34 Stat. 814, 816 (United States Court for China); Act of Mar. 3, 1925, c. 443, § 3a, 43 Stat. 1119 (Police Court of the District of Columbia).

[32] Act of May 27, 1908, c. 205, § 3, 35 Stat. 403, 406, does so in express terms. *Shurtleff* v. *United States*, 189 U. S. 311, 314, 317, declares that, by construction, every Act which prescribes specific causes for removal requires that removal be not made for such cause without a hearing. In *Reagan* v. *United States*, 182 U. S. 419, 425, it was said: "The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient." State courts have held that statutes providing for removal "for cause" require that the appointee be given notice and an opportunity to defend himself. *State* v. *Frazier*, 47 N. D. 314; *Street Commissioners* v. *Williams*, 96 Md. 232; *Ham* v. *Board of Police*, 142 Mass. 90; *Haight* v. *Love*, 39 N. J. L. 14, aff'd. 39 N. J. L. 476; *Biggs* v. *McBride*, 17 Oreg. 640.

[33] Act of June 3, 1864, c. 106, § 1, 13 Stat. 99, Comptroller of the Currency; Act of Feb. 12, 1873, c. 131, § 1, 17 Stat. 424, Director of the Mint.

[34] The executive orders of Jan. 31, 1902, and Jan. 25, 1906, prescribed dismissal as a penalty for agitation by civil employees for an

Act of June 10, 1921, c. 18 § 303, 42 Stat. 20, 24, provides a fixed term for the Comptroller General and the Assistant Comptroller General, and makes these officers removable only by impeachment or, by joint resolution of Congress, after hearing, for one of the causes specified. It should be noted that while President Wilson had, on June 4, 1920, vetoed an earlier Budget Act, which like this denied to the President any participation in the removal, he had approved the Mediation and Conciliation Act of July 15, 1918, and the Railroad Labor Board Act of February 28, 1920, which prohibited removals except for the causes therein specified.

The assertion that the mere grant by the Constitution of executive power confers upon the President as a prerogative the unrestricted power of appointment and of removal from executive offices, except so far as otherwise expressly provided by the Constitution, is clearly inconsistent also with those statutes which restrict the exercise by the President of the power of nomination. There is not a word in the Constitution which in terms authorizes

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increase in wages. The executive orders of Nov. 26, 1909, and April 8, 1912, forbade communications to members of Congress save through heads of departments. Report of U. S. Civil Service Commission, for 1912, pp. 23–24. Section 6 of the Act of 1912 was intended to override these orders. See 48 Cong. Rec. 5634–5636. On Feb. 19, 1886, the National Civil Service Reform League in a series of resolutions recommended that the reasons for removal be treated as "part of the public record." 5 Civ. Serv. Rec. 92. On Aug. 9, 1890, Commissioner Roosevelt advocated such a restriction upon removals. 10 Civ. Serv. Rec. 26. A bill reported from the Select Committee of the House on Civil Service Reform in 1891 contained such a provision. House Rep. No. 4038, 51 Cong., 2d sess., Ser. No. 2890. The Attorney General in 1913 ruled, against an earlier opinion of the Civil Service Commission, that Presidential appointees were excluded from the terms of the Act of 1912. 30 Op. A. G. 181. The Civil Service Act of Jan. 16, 1883, c. 27, § 2, 22 Stat. 403, 404, which was approved by President Arthur, had also provided that failure to subscribe to political funds should not be a ground of dismissal.

Congress to limit the President's freedom of choice in making nominations for executive offices. It is to appointment as distinguished from nomination that the Constitution imposes in terms the requirement of Senatorial consent. But a multitude of laws have been enacted which limit the President's power to make nominations, and which, through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes appointments without the advice and consent of the Senate as well as of those for which its consent is required.

Thus, Congress has, from time to time, restricted the President's selection by the requirement of citizenship.[35]

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[35] Citizens of

(a) The United States: Act of May 3, 1802, c. 53, § 5, 2 Stat. 195, 196, mayor of the District of Columbia; Act of Mar. 1, 1855, c. 133, § 9, 10 Stat. 619, 623, ministers and their subordinates; Act of Aug. 18, 1856, c. 127, § 7, 11 Stat. 52, 55, consular pupils; Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139, consular clerks; Act of Mar. 22, 1902, c. 272, 32 Stat. 76, 78, Act of Feb. 9, 1903, c. 530, 32 Stat. 807, 809, Act of Mar. 12, 1904, c. 543, 33 Stat. 67, 69, Act of Mar. 3, 1905, c. 1407, 33 Stat. 915, 917, Act of June 16, 1906, c. 3337, 34 Stat. 286, 288, Act of Feb. 22, 1907, c. 1184, 34 Stat. 916, 918, Act of May 21, 1908, c. 183, 35 Stat. 171, 172, Act of Mar. 2, 1909, c. 235, 35 Stat. 672, 674, Act of May 6, 1910, c. 199, 36 Stat. 337, 339, Act of Mar. 3, 1911, c. 208, 36 Stat. 1027, 1029, Act of April 30, 1912, c. 97, 37 Stat. 94, 96, Act of Feb. 28, 1913, c. 86, 37 Stat. 688, 689, Act of June 30, 1914, c. 132, 38 Stat. 442, 444, Act of Mar. 4, 1915, c. 145, 38 Stat. 1116, 1117, Act of July 1, 1916, c. 208, 39 Stat. 252, 253, Act of Mar. 3, 1917, c. 161, 39 Stat. 1047, 1049, Act of April 15, 1918, c. 52, 40 Stat. 519, 520, Act of Mar. 4, 1919, c. 123, 40 Stat. 1325, 1327, Act of June 4, 1920, c. 223, 41 Stat. 739, 741, Act of Mar. 2, 1921, c. 113, 41 Stat. 1205, 1207, Act of June 1, 1922, c. 204, 42 Stat. 599, 601, Act of

It has limited the power of nomination by providing that the office may be held only by a resident of the United States [36]; of a State [37]; of a particular State [38]; of a par-

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Jan. 3, 1923, c. 21, 42 Stat. 1068, 1070, student interpreters for China, Japan and Turkey; Act of April 5, 1906, c. 1366, § 5, 34 Stat. 99, 101, clerks in consular office receiving more than $1,000 per annum; Act of July 17, 1916, c. 245, § 3, 39 Stat. 360, Federal Farm Loan Board; Act of Feb. 23, 1917, c. 114, § 6, 39 Stat. 929, 932, Federal Board for Vocational Education; Act of May 24, 1924, c. 182, § 5, 43 Stat. 140, 141, Foreign Service officers; Act of June 7, 1924, c. 287, § 7, 43 Stat. 473, 474, board of advisors to the Federal Industrial Institution for Women.

(b) A State: Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, attorney and interpreter for the Court of Private Land Claims.

(c) A Particular State: Act of July 27, 1854, c. 110, § 1, 10 Stat. 313, commissioner to adjust Indiana land claims; Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1036, Act of May 30, 1910, c. 260, § 4, 36 Stat. 448, 450, Act of June 1, 1910, c. 264, § 7, 36 Stat. 455, 457, Act of Aug. 3, 1914, c. 224, § 3, 38 Stat. 681, 682, various commissions to appraise unallotted Indian lands.

(d) A Particular Territory: Act of April 12, 1900, c. 191, § 40, 31 Stat. 77, 86, commission to revise the laws of Porto Rico; Act of April 30, 1900, c. 339, §§ 66, 69, 31 Stat. 141, 153, 154, governor and secretary of Hawaii; Act of July 9, 1921, c. 42, §§ 303, 313, 42 Stat. 108, 116, 119, governor, attorney and marshal of Hawaii.

(e) District of Columbia: Act of Mar. 3, 1855, c. 199, § 2, 10 Stat. 682, board of visitors for Government Hospital for the Insane; Act of Feb. 21, 1871, c. 62, § 37, 16 Stat. 419, 426, Board of Public Works; Act of June 11, 1878, c. 180, § 2, 20 Stat. 102, 103, commissioners of the District; Act of Sept. 27, 1890, c. 1001, § 2, 26 Stat. 492, Rock Creek Park Commission.

[36] Act of Mar. 1, 1855, c. 133, § 9, 10 Stat. 619, 623, ministers and their subordinates.

[37] Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, attorney and interpreter for the Court of Private Land Claims.

[38] Act of Mar. 29, 1867, c. 14, § 1, 15 Stat. 9, commissioners to ascertain the amount raised in Indiana in enrolling the militia; Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1036, Act of May 30, 1910, c. 260, § 4, 36 Stat. 448, 450, Act of June 1, 1910, c. 264, § 7, 36 Stat. 455, 457, Act of Aug. 3, 1914, c. 224 § 3, 38 Stat. 681, 682, various commissions for the appraisal of unallotted Indian lands.

ticular district[39]; of a particular territory[40]; of the District of Columbia[41]; of a particular foreign country.[42] It has limited the power of nomination further by prescribing specific professional attainments,[43] or occupational

[39] Act of July 1, 1862, c. 119, § 2, 12 Stat. 432, 433, assessors and collectors of internal revenue; and semble, Act of July 2, 1836, c. 270, § 36, 5 Stat. 80, 88, postmasters.

[40] Act of Mar. 26, 1804, c. 38, § 4, 2 Stat. 283, 284, legislative council of Louisiana; Act of Mar. 3, 1891, c. 564, § 2, 26 Stat. 1104, territorial mine inspectors; Act of July 9, 1921, c. 42, §§ 303, 313, 42 Stat. 108, 116, 119, governor, attorney and marshal of Hawaii.

[41] Act of May 3, 1802, c. 53, § 5, 2 Stat. 195, 196, mayor of the District of Columbia; Act of April 16, 1862, c. 54, § 3, 12 Stat. 376, commissioners for claims arising from the abolition of slavery; Act of Feb. 21, 1874, c. 62, § 37, 16 Stat. 419, 426, Board of Public Works; Act of June 7, 1878, c. 162, § 5, 20 Stat. 100, 101, notaries public; Act of June 11, 1878, c. 180, § 2, 20 Stat. 102, 103, commissioners of the District.

[42] Act of Mar. 3, 1819, c. 101, § 2, 3 Stat. 532, 533, agents on the coast of Africa to receive negroes from vessels seized in the slave trade.

[43] Professional qualifications:

(a) Learning in the Law: Act of Sept. 24, 1789, c. 20, § 35, 1 Stat. 73, 92, Attorney-General and district attorneys; Act of Mar. 26, 1804, c. 38, § 8, 2 Stat. 283, 286, attorney for Louisiana Territory; Act of April 3, 1818, c. 29, § 4, 3 Stat. 413, attorney for Mississippi; Act of Mar. 3, 1819, c. 70, § 4, 3 Stat. 502, 503, attorney for Illinois; Act of April 21, 1820, c. 47 § 6, 3 Stat. 564, 565, attorney for Alabama; Act of Mar. 16, 1822, c. 12, § 4, 3 Stat. 653, attorney for Missouri; Act of Mar. 30, 1822, c. 13, § 7, 3 Stat. 654, 656, attorney for Florida Territory; Act of Mar. 3, 1823, c. 28, § 9, 3 Stat. 750, 752, attorney for Florida Territory; Act of May 26, 1824, c. 163, § 3, 4 Stat. 45, 46, attorney for Florida Territory; Act of May 29, 1830, c. 153, § 1, 4 Stat. 414, solicitor of the Treasury; Act of June 15, 1836, c. 100, § 6, 5 Stat. 50, 51, attorney for Arkansas; Act of July 1, 1836, c. 234, § 4, 5 Stat. 61, 62, attorney for Michigan; Act of Mar. 3, 1845, c. 75, § 7, 5 Stat. 788, attorney for Florida; Act of Mar. 3, 1845, c. 76, § 4, 5 Stat. 789, attorney for Iowa; Act of Dec. 29, 1845, c. 1, § 3, 9 Stat. 1, attorney for Texas; Act of Aug. 6, 1846, c. 89, § 5, 9 Stat. 56, 57, attorney for Wisconsin; Act of Feb. 23, 1847, c. 20, § 5, 9 Stat. 131, attorney for Florida; Act of Sept. 28, 1850, c. 86, § 8, 9 Stat. 521, 522, attorney for California; Act of Mar. 3, 1851, c. 41, § 4, 9 Stat. 631,

experience.[44] It has, in other cases, prescribed the test of examinations.[45] It has imposed the requirement of

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agent for California Land Commission; Act of Aug. 31, 1852, c. 108, § 12, 10 Stat. 76, 99, law agent for California; Act of July 27, 1854, c. 110, § 1, 10 Stat. 313, commissioner to adjust land claims; Act of Mar. 4, 1855, c. 174, § 1, 10 Stat. 642, commissioners to revise District of Columbia laws; Act of Mar. 3, 1859, c. 80, 11 Stat. 410, 420, Assistant Attorney-General; Act of Mar. 2, 1861, c. 88, § 2, 12 Stat. 246, examiners-in-chief in Patent Office; Act of May 20, 1862, c. 79, § 1, 12 Stat. 403, commissioners to revise District of Columbia laws; Act of Mar. 3, 1863, c. 91, § 17, 12 Stat. 762, 765, commissioners to revise District of Columbia laws; Act of Mar. 3, 1863, c. 101, § 2, 12 Stat. 795, solicitor to Peruvian Commissioners; Act of June 27, 1866, c. 140, § 1, 14 Stat. 74, commissioners to revise United States laws, Joint Res. of May 27, 1870, No. 66, § 1, 16 Stat. 378, examiner of claims for the Department of State; Act of June 22, 1870, c. 150, §§ 2, 3, 16 Stat. 162, Solicitor-General and Assistant Attorney-Generals; Act of July 8, 1870, c. 230, § 10, 16 Stat. 198, 200, examiners-in-chief in Patent Office; Act of Mar. 2, 1877, c. 82, § 1, 19 Stat. 268, commissioner for a new edition of the Revised Statutes; Act of Mar. 6, 1890, c. 27, § 1, 26 Stat. 17, delegates to the International Conference at Madrid in patent and trade-mark laws; Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, attorney of the Court of Private Land Claims; Act of Mar. 2, 1901, c. 800, § 1, 31 Stat. 877, Spanish claims commissioners; Act of June 13, 1902, c. 1079, § 4, 32 Stat. 331, 373, commission on Canadian boundary waters to include one lawyer experienced in international and riparian law.

(b) Versed in Spanish and English Languages: Act of Mar. 3, 1849, c. 107, § 2, 9 Stat. 393, secretary to Mexican Treaty Commissioners; Act of Mar. 3, 1851, c. 41, § 4, 9 Stat. 631, agent for California Land Commission; Act of Aug. 31, 1852, c. 108, § 12, 10 Stat. 76, 99, law agent in California; Act of May 16, 1860, c. 48, § 2, 12 Stat. 15, secretary of Paraguay Commission; Act of Feb. 20, 1861, c. 45, § 2, 12 Stat. 145, secretary of New Granada Commission; Act of Mar. 3, 1863, c. 101, §§ 2, 3, 12 Stat. 795, solicitor and secretary of Peruvian Commissioners; Joint Res. of Jan. 12, 1871, No. 7, § 1, 16 Stat. 591, secretary of San Domingo Commissioners; Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, interpreter to the Court of Private Land Claims.

(c) Engineering: Act of Feb. 21, 1871, c. 62, § 37, 16 Stat. 419, 426, District of Columbia Board of Public Works: Act of April 4, 1871, c. 9, § 1, 17 Stat. 3, commission to examine Sutro Tunnel; Act

age [46]; of sex [47]; of race [48]; of property [49]; and of habitual temperance in the use of intoxicating liquors.[50] Congress

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of June 22, 1874, c. 411, § 1, 18 Stat. 199, commission to examine alluvial basin of Mississippi River; Act of June 28, 1879, c. 43, § 2, 21 Stat. 37, Mississippi River Commission; Act of June 4, 1897, c. 2, 30 Stat. 11, 59, Nicaragua Canal Commission; Act of June 13, 1902, c. 1079, § 4, 32 Stat. 331, 373, commission on Canadian boundary waters; Act of June 28, 1902, c. 1302, § 7, 32 Stat. 481, 483, Isthmian Canal Commission; Act of Aug. 24, 1912, c. 387, § 18, 37 Stat. 512, 517, Alaskan Railroad Commission; Act of Aug. 8, 1917, c. 49, § 18, 40 Stat. 250, 269, Inland Waterways Commission; Act of May 13, 1924, c. 153, 43 Stat. 118, Rio Grande Commission.

(d) Miscellaneous:—Joint Res. of July 5, 1866, No. 66, § 1, 14 Stat. 362, commissioners to Paris Universal Exhibition to be professional and scientific men; Act of June 10, 1896, c. 398, 29 Stat. 321, 342, commissioners to locate Indian boundaries to be surveyors; Act of Aug. 24, 1912, c. 387, § 18, 37 Stat. 512, 517, Alaskan Railroad Commission to include one geologist in charge of Alaskan survey.

[44] Act of Aug. 26, 1852, c. 91, § 2, 10 Stat. 30, superintendent of public printing to be a practical printer; Act of Aug. 31, 1852, c. 112, § 8, 10 Stat. 112, 119, Light House Board to include civilian of high scientific attainments; Act of July 27, 1866, c. 284, § 1, 14 Stat. 302, appraiser for New York to have had experience as an appraiser or to be practically acquainted with the quality and value of some one or more of the chief articles of importation subject to appraisement; Joint Res. of Feb. 9, 1871, No. 22, § 1, 16 Stat. 593, 594, commissioner for fish and fisheries to be a person of proved scientific and practical acquaintance with the fishes of the coast; Act of Feb. 28, 1871, c. 100, §§ 23, 63, 16 Stat. 440, 448, 458, supervising inspectors of steam vessels to be selected for their knowledge, skill, and practical experience in the uses of steam for navigation and to be competent judges of the character and qualities of steam vessels and of all parts of the machinery employed in steaming, inspector-general to be selected with reference to his fitness and ability to systematize and carry into effect all the provisions of law relating to the steamboat inspection service, Act of June 23, 1874, c. 480, § 2, 18 Stat. 277, 278, inspector of gas in the District of Columbia to be a chemist, assistant inspector to be a gas-fitter by trade; Joint Res. of Dec. 15, 1877, No. 1, § 2, 20 Stat. 245, commissioners to the International Industrial Exposition in Paris to include three practical artisan experts, four practical agriculturists, and nine scientific experts; Act of June 18, 1878, c. 265, § 6, 20 Stat.

has imposed like restrictions on the power of nomination by requiring political representation [51]; or that the selec-

163, 164, superintendent of Life Saving Service to be familiar with the various means employed in the Life Saving Service for the saving of life and property from shipwrecked vessels; Act of June 29, 1888, c. 503, § 8, 25 Stat. 217, 238, superintendent of Indian schools to be a person of knowledge and experience in the management, training and practical education of children; Act of July 9, 1888, c. 593, § 1, 25 Stat. 243, delegates to the International Marine Conference to include two masters of merchant marine (one sailing and one steam), and two civilians familiar with shipping and admiralty practice; Act of Mar. 3, 1891, c. 564, § 2, 26 Stat. 1104, mine inspectors in the territories to be practical miners; Act of July 13, 1892, c. 164, 27 Stat. 120, 139, Indian commissioners to be familiar with Indian affairs; Act of Jan. 12, 1895, c. 23, § 17, 28 Stat. 601, 603, public printer to be a practical printer; Act of Mar. 3, 1899, c. 419, § 2, 30 Stat. 1014, assistant director of the Census to be an experienced practical statistician; Act of May 16, 1910, c. 240, § 1, 36 Stat. 369, Director of Bureau of Mines to be equipped by technical education and experience; Act of Dec. 23, 1913, c. 6, § 10, 38 Stat. 251, 260, Federal Reserve Board to include two members experienced in banking or finance; Act of Mar. 3, 1919, c. 97, § 3, 40 Stat. 1291, 1292, assistant director of the Census to be an experienced practical statistician; Act of June 2, 1924, c. 234, § 900b, 43 Stat. 253, 336, Board of Tax Appeals to be selected solely on grounds of fitness to perform duties of the office.

[45] Act of Mar. 3, 1853, c. 97, § 3, 10 Stat. 189, 211, examination required of clerks in the Departments of Treasury, War, Navy, Interior, and Post Office; Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139, examination required of consular clerks; Act of Jan. 16, 1883, c. 27, § 2, 22 Stat. 403, examinations for civil service employees; Act of Jan. 4, 1889, c. 19, § 1, 25 Stat. 639, medical officers of Marine Hospital Service; Act of May 22, 1917, c. 20, § 16, 40 Stat. 84, 88, officers of the Coast and Geodetic Survey; Act of Oct. 27, 1918, c. 196, § 16, 40 Stat. 1017, examinations for Public Health Service Reserve; Act of May 24, 1924, c. 182, § 5, 43 Stat. 140, 141, examination for appointments as Foreign Service officers in Diplomatic Corps.

[46] Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139, consular clerks; Act of April 30, 1900, c. 339, § 66, 31 Stat. 141, 153, governor of Hawaii; Act of July 9, 1921, c. 42, § 303, 42 Stat. 108, 116, governor of Hawaii.

tion be made on a nonpartisan basis.[52] It has required in some cases, that the representation be industrial[53]; in

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[47] Joint Res. of Feb. 23, 1900, No. 9, 31 Stat. 711, one commissioner to represent the United States at the unveiling of the statue of Lafayette to be a woman; Act of June 5, 1920, c. 248, § 2, 41 Stat. 987, Director of Women's Bureau to be a woman.

[48] Act of July 1, 1902, c. 1362, § 59, 32 Stat. 641, 654, commission to sell coal and asphalt deposits in Indian lands to include two Indians.

[49] Act of Mar. 26, 1804, c. 38, § 4, 2 Stat. 283, 284, legislative council of Louisiana to be selected from those holding real estate.

[50] Act of Jan. 16, 1883, c. 27, § 8, 22 Stat. 403, 406, civil service appointees.

[51] Act of Mar. 22, 1882, c. 47, § 9, 22 Stat. 30, 32, board of elections in Utah Territory; Act of Jan. 16, 1883, c. 27, § 1, 22 Stat. 403, Civil Service Commission; Act of Feb. 4, 1887, c. 104, § 11, 24 Stat. 379, 383, amended by Act of June 29, 1906, c. 3591, § 8, 34 Stat. 584, 595, Act of Aug. 9, 1917, c. 50, § 1, 40 Stat. 270, and Act of Feb. 28, 1920, c. 91, § 440, 41 Stat. 456, 497, Interstate Commerce Commission; Act of June 10, 1890, c. 407, § 12, 26 Stat. 131, 136, Board of General Appraisers; Act of Mar. 2, 1889, c. 412, § 14, 25 Stat. 980, 1005, Act of Aug. 19, 1890, c. 807, 26 Stat. 336, 354, Act of July 13, 1892, c. 164, 27 Stat. 120, 138, 139, Act of June 10, 1896, c. 398, 29 Stat. 321, 342, various commissions to negotiate Indian treaties; Act of Sept. 26, 1914, c. 311, § 1, 38 Stat. 717, Federal Trade Commission; Act of July 17, 1916, c. 245, § 3, 39 Stat. 360, Federal Farm Loan Board; Act of Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729, amended by Act of June 5, 1920, c. 250, § 3a, 41 Stat. 988, 989, United States Shipping Board; Act of Sept. 7, 1916, c. 458, § 28, 39 Stat. 742, 748, United States Employees' Compensation Commission; Act of Sept. 8, 1916, c. 463, § 700, 39 Stat. 756, 795, United States Tariff Commission; Act of Sept. 21, 1922, c. 356, § 518, 42 Stat. 858, 972, Board of General Appraisers; Act of Feb. 28, 1923, c. 146, § 2, 42 Stat. 1325, 1326, World War Foreign Debt Commission.

[52] Act of Mar. 3, 1901, c. 864, § 2, 31 Stat. 1440, Louisiana Purchase Exposition commission; Act of Mar. 22, 1902, c. 272, 32 Stat. 76, 78, Act of Feb. 9, 1903, c. 530, 32 Stat. 807, 809, Act of Mar. 12, 1904, c. 543, 33 Stat. 67, 69, Act of Mar. 3, 1905, c. 1407, 33 Stat. 915, 917, Act of June 16, 1906, c. 3337, 34 Stat. 286, 288, Act of Feb. 22, 1907, c. 1184, 34 Stat. 916, 918, Act of May 21, 1908, c. 183, 35 Stat. 171, 172, Act of Mar. 2, 1909, c. 235, 35 Stat. 672, 674, Act of May 6, 1910, c. 199, 36 Stat. 337, 339, Act of Mar. 3, 1911, c. 208, 36 Stat. 1027

others, that it be geographic.[54] It has at times required that the President's nominees be taken from, or include

1029, Act of April 30, 1912, c. 97, 37 Stat. 94, 96, Act of Feb. 28, 1913, c. 86, 37 Stat. 688, 689, Act of June 30, 1914, c. 132, 38 Stat. 442, 444, Act of Mar. 4, 1915, c. 145, 38 Stat. 1116, 1117, Act of July 1, 1916, c. 208, 39 Stat. 252, 253, Act of Mar. 3, 1917, c. 161, 39 Stat. 1047 1049, Act of April 15, 1918, c. 52, 40 Stat. 519, 520, Act of Mar. 4, 1919, c. 123, 40 Stat. 1325, 1327, Act of June 4, 1920, c. 223, 41 Stat. 739, 741, Act of Mar. 2, 1921, c. 113, 41 Stat. 1205, 1207, Act of June 1, 1922, c. 204, 42 Stat. 599, 601, Act of Jan. 3, 1923, c. 21, 42 Stat. 1068, 1070, student interpreters for China, Japan, and Turkey.

[53] Joint Res. of Dec. 15, 1877, No. 1, § 2, 20 Stat. 245, commissioners to the International Industrial Exposition in Paris; Act of June 18, 1898, c. 466, § 1, 30 Stat. 476, Industrial Commission; Act of Aug. 23, 1912, c. 351, § 1, 37 Stat. 415, Commission on Industrial Relations; Act of Dec. 23, 1913, c. 6, § 10, 38 Stat. 251, 260, amended by Act of June 3, 1922, c. 205, 42 Stat. 620, Federal Reserve Board; Act of Feb. 23, 1917, c. 114, § 6, 39 Stat. 929, 932, Federal Board for Vocational Education; Act of Feb. 28, 1920, c. 91, § 304, 41 Stat. 456, 470.

[54] Act of Aug. 6, 1861, c. 62, § 3, 12 Stat. 320, Board of Police Commissioners for the District of Columbia; Act of Feb. 16, 1863, c. 37, § 3, 12 Stat. 652, 653, commissioners to settle Sioux Indians' claims; Act of Mar. 3, 1863, c. 106, § 1, 12 Stat. 799, levy court of the District of Columbia; Act of Mar. 3, 1871, c. 105, § 2, 16 Stat. 470, 471, commissioners to the Philadelphia Exposition; Joint Res. of Dec. 15, 1877, No. 1, § 2, 20 Stat. 245, commissioners to the International Industrial Exposition in Paris; Act of Mar. 3, 1879, c. 202, § 1, 20 Stat. 484, National Board of Health; Act of Aug. 5, 1882, c. 389, § 4, 22 Stat. 219, 255, civil employees of certain departments; Act of Jan. 16, 1883, c. 27, § 2, 22 Stat. 403, civil service appointees; Act of Feb. 10, 1883, § 3, 22 Stat. 413, commissioners of World's Industrial and Cotton Centennial Exposition; Act of April 25, 1890, c. 156, § 3, 26 Stat. 62, World's Columbian Exposition Commission; Act of Aug. 19, 1890, c. 807, 26 Stat. 336, 354–355, commissions to negotiate Indian treaties and investigate reservations; Act of Mar. 3, 1893, c. 209, § 1, 27 Stat. 612, 633, commission to select allotted Indian lands; Act of June 10, 1896, c. 398, 29 Stat. 321, 342, commission to adjust Indian boundaries; Act of Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729, amended by Act of June 5, 1920, c. 250, § 3a, 41 Stat. 988, 989, United States Shipping Board; Act of Mar. 4, 1921,

representatives from, particular branches or departments of the Government.[55] By still other statutes, Congress

c. 171, § 3, 41 Stat. 1441, 1442, commission to appraise buildings of Washington Market Company; Act of June 3, 1922, c. 205, 42 Stat. 620, Federal Reserve Board; Joint Res. of Mar. 3, 1925, c. 482, § 1, 43 Stat. 1253, National Advisory Commission to the Sesquicentennial Exhibition Association.

[55] (a) Selection to be from civil employees: Joint Res. of Feb. 9, 1871, No. 22, § 1, 16 Stat. 593, 594, commissioner of fish and fisheries; Act of May 27, 1908, c. 200, § 11, 35 Stat. 317, 388, board of managers of Alaska-Yukon-Pacific Exposition; Act of June 23, 1913, c. 3, 38 Stat. 4, 76, Panama-Pacific Exposition Government Exhibit Board.

(b) Selection to be from particular civil employees: Act of April 5, 1906, c. 1366, § 4, 34 Stat. 99, 100, consulate inspectors from consulate force.

(c) Selection to be from army officers: Act of July 20, 1867, c. 32, § 1, 15 Stat. 17, commission to treat with hostile Indians; Act of Mar. 3, 1873, c. 316, § 1, 17 Stat. 622, commission to report on irrigation in the San Joaquin valley; Act of Mar. 1, 1893, c. 183, § 1, 27 Stat. 507, California Debris Commission; Act of June 4, 1897, c. 2, 30 Stat. 11, 51, board to examine Aransas Pass; Joint Res. of Aug. 9, 1912, No. 40, § 2, 37 Stat. 641, commission to investigate Mexican insurrection claims; Act of Mar. 4, 1923, c. 283, § 1, 42 Stat. 1509, secretary of American Battle Monuments Commission.

(d) Selection to be from army and navy: Act of April 14, 1818, c. 58, § 1, 3 Stat. 425, coast surveyors.

(e) Boards to include civilian representative of the Government: Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1036, Act of May 30, 1910, c. 260, § 4, 36 Stat. 448, 450, Act of June 1, 1910, c. 264, § 7, 36 Stat. 455, 457, Act of Aug. 3, 1914, c. 224, § 3, 38 Stat. 681, 682, various commissions to appraise unallotted Indian lands to include one representative of the Indian Bureau; Joint Res. of Mar. 4, 1911, No. 16, 36 Stat. 1458, commission to investigate cost of handling mail to include one Supreme Court Justice.

(f) Commissions to include army officers: Act of April 4, 1871, c. 9, § 1, 17 Stat. 3, commission to examine Sutro Tunnel; Act of June 13, 1902, c. 1079, § 4, 32 Stat. 331, 373, commission on Canadian boundary waters; Act of Aug. 8, 1917, c. 49, § 18, 40 Stat. 250, 269, Inland Waterways Commission.

(g) Commissions to include army and navy officers: Act of Aug. 31, 1852, c. 112, § 8, 10 Stat. 112, 119, Light House Board; Act of

has confined the President's selection to a small number of persons to be named by others.[56]

The significance of this mass of legislation restricting the power of nomination is heightened by the action which President Jackson and the Senate took when the right to impose such restrictions was, so far as appears, first mooted. On February 3, 1831, the Senate resolved that it was inexpedient to appoint a citizen of one State to an office created or made vacant in another State of which such citizen was not a resident, unless an apparent necessity for such appointment existed. 4 Ex. Journ. 150.

June 4, 1897, c. 2, 30 Stat. 11, 59, Nicaragua Canal Commission; Act of June 28, 1902, c. 1302, § 7, 32 Stat. 481, 483, Isthmian Canal Commission; Joint Res. of June 28, 1906, No. 37, 34 Stat. 835, commission to appraise Chesapeake and Delaware Canal; Act of Aug. 24, 1912, c. 387, § 18, 37 Stat. 512, 517, Alaskan Railroad Commission.

(h) Commissions to include army and coast survey officers; Act of June 23, 1874, c. 457, § 3, 18 Stat. 237, 244, board of harbor engineers; Act of June 28, 1879, c. 43, § 2, 21 Stat. 37, Mississippi River Commission.

(i) Board to include navy officers and official of Life Saving Service: Act of July 9, 1888, c. 593, § 1, 25 Stat. 243, delegates to International Marine Conference.

[56]Act of Feb. 25, 1863, c. 58, § 1, 12 Stat. 665, Comptroller of the Currency, on nomination of the Secretary of the Treasury, amended by Act of June 3, 1864, c. 106, § 1, 13 Stat. 99; Act of April 23, 1880, c. 60, § 4, 21 Stat. 77, 78, United States International Commission, on nominations of state governors; Act of Feb. 10, 1883, c. 42, §§ 2, 3, 22 Stat. 413, managers of World's Industrial and Cotton Centennial Exposition, on recommendation of executive committee of National Cotton Planters' Association and majority of subscribers to enterprise in the city where it shall be located, commissioners to the Exposition to be appointed on nomination of state governors; Act of July 1, 1902, c. 1362, § 59, 32 Stat. 641, 654, commission to sell coal and asphalt deposits in Indian lands, one appointment to be made on recommendation of principal chief of Choctaw Nation, one on recommendation of Governor of Chickasaw Nation; Act of Feb. 23, 1920, c. 91, § 304, 41 Stat. 456, 470, Railroad Labor Board, three to be appointed from six nominees made by employees, three to be appointed from six nominees made by carriers.

Several nominations having been rejected by the Senate in accordance with the terms of this resolution, President Jackson communicated his protest to the Senate, on March 2, 1833, saying that he regarded "that resolution, in effect, as an unconstitutional restraint upon the authority of the President in relation to appointments to office." Thereupon, the Senate rescinded the resolution of 1831. 4 Ex. Journ. 331. But that Congress had the power was not questioned. The practice of prescribing by statute that nominations to an inferior presidential office shall be limited to residents of a particular State or district has prevailed, without interruption, for three-quarters of a century.[57]

The practical disadvantage to the public service of denying to the President the uncontrollable power of removal from inferior civil offices would seem to have been exaggerated. Upon the service, the immediate effect would ordinarily be substantially the same, whether the President, acting alone, has or has not the power of removal. For he can, at any time, exercise his constitutional right to suspend an officer and designate some other person to act temporarily in his stead; and he cannot, while the Senate is in session, appoint a successor without its consent. Compare *Embry* v. *United States,* 100 U. S. 680. On the other hand, to the individual in the public service, and to the maintenance of its morale, the existence of a power in Congress to impose upon the Senate the duty to share in the responsibility for a removal is of paramount importance. The Senate's consideration of

[57] On July 25, 1868, the Senate having confirmed the nomination of J. Marr as collector of internal revenue in Montana Territory, voted to reconsider the nomination, and ordered the nomination to be returned to the President "with the notification that the nominee is ineligible on account of non-residence in the district for whch he is nominated." 16 Ex. Journ. 372. President Johnson thereafter did not press Marr's nomination but appointed A. J. Simmons to the office. 16 *ibid.* 429.

a proposed removal may be necessary to protect reputation and emoluments of office from arbitrary executive action. Equivalent protection is afforded to other inferior officers whom Congress has placed in the classified civil service and which it authorizes the heads of departments to appoint and to remove without the consent of the Senate. Act of August 24, 1912, c. 389, § 6, 37 Stat. 539, 555. The existence of some such provision is a common incident of free governments. In the United States, where executive responsibility is not safeguarded by the practice of parliamentary interpellation, such means of protection to persons appointed to office by the President with the consent of the Senate is of special value.

Until the Civil Service Law, January 16, 1883, c. 27, 22 Stat. 403, was enacted, the requirement of consent of the Senate to removal and appointment was the only means of curbing the abuses of the spoils system. The contest over making Cabinet officers subject to the provisions of the Tenure of Office Act of 1867 has obscured the significance of that measure as an instrument designed to prevent abuses in the civil service.[58] But the importance of the measure as a means of civil service reform was urged at the time of its passage;[59] again

[58] The Tenure of Office Act as originally introduced excepted from its operation the Secretaries of State, Treasury, War, Navy, Interior and the Postmaster General. Howe's attempts to strike out this exception, opposed by Senators Edmunds and Sherman, who were the principal sponsors of the Act, failed twice in the Senate. A similar attempt in the House succeeded after first being rejected. The Senate again refused to concur in the House amendment. The amendment was, however, insisted upon by the House conferees. Finally, the Senate by a margin of three votes agreed to accept the conference report. Cong. Globe, 39th Cong., 2d sess., 1518.

[59] The occasion of the passage of the Tenure of Office Act was the threatened attempt of President Johnson to interfere with the reconstruction policies of Congress through his control over patronage. An attempt by Schenck to secure its recommitment to the Joint Select Committee on Retrenchment was placed upon the ground that

when its repeal was resisted in 1869 [60] and in 1872;[61] and finally in 1887, when its repeal was effected.[62] That Act

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" this whole subject was expressly referred to that committee " which had before it " the bill introduced by the select committee on the civil service, at the head of which is the gentleman from Rhode Island [Mr. Jenckes]." Cong. Globe, 39th Cong., 2d sess., 23. Senator Edmunds, in resisting an attempt to expand the Tenure of Office Act to require the concurrence of the Senate in the appointment of all civil officers receiving more than $1,000 per annum, referred to the Jenckes bill as " another branch of the subject which is under consideration elsewhere." *Ibid,* 489. The committee in introducing the Tenure of Office Act, speaking through Senator Edmunds, " recommended the adoption of this rule respecting the tenure of officers as a permanent and systematic and as they believe an appropriate regulation of the Government for all Administrations and for all time." *Ibid,* 382.

[60] The attempt on the part of the House to repeal the Act in 1869 brought forth the opposition of those members of the Senate who were most active in the general movement for civil service reform. Jenckes had voted against the repeal in the House. Carl Schurz, who on Dec. 20, 1869, introduced a bill for the competitive principle in the civil service, opposed the repeal, and urged that it be recast at the next session more effectually to effect the desired civil service reform. Cong. Globe, 41st Cong., 1st sess., 155–156. Trumbull, speaking for the Committee on Judiciary, said that " they were unwilling after Congress had with such unanimity adopted this law within the last two years, and adopted it upon the principle that some law of this kind was proper to regulate the civil service, to recommend its absolute repeal . . . they thought it better to recommend the suspension of the act until the next session of Congress, and then Congress can either repeal it or adopt some civil-service bill which in its judgment shall be thought to be for the best and permanent interests of the country." *Ibid.* 88. The National Quarterly Review recognizing the essential unanimity of purpose between the Tenure of Office Act and other measures for civil service reform, said in 1867: " The recent legislation on this subject by Congress was the first step in the right direction; Mr. Jencke's bill is the second; but the one without the other is incomplete and unsafe." House Rep. No. 47, 40th Cong., 2d sess., Ser. No. 1352, p. 93.

[61] The attempt to repeal the Act was resisted in the House by Holman on the ground that since " the general impression exists in

was one of two far reaching measures introduced in 1866 aimed at the abuses of executive patronage. The Jenckes bill was to establish the classified service. The Tenure of Office bill was to control removals from presidential offices. Like the Jenckes bill, it applied, when introduced, only to inferior offices. The Jenckes bill, reported by the House Committee on June 13, 1866, was finally tabled in the House on February 6, 1867.[63] The Tenure of Office bill was reported out in the House on December 5, 1866;

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the country that executive patronage should be in some form reduced rather than increased . . . this fragment of the original law should remain in force." Cong. Globe, 42nd Cong., 2d sess., 3411.

[62] Edmunds, one of the few Senators still acquainted with the circumstances of its passage, thus protested against the passage of the repealing Act: "It is, as it looks to me, as if we were to turn our backs now and here upon the principle of civil-service reform . . . the passage of this bill would be the greatest practical step backward on the theory of the reformation of the civil service of the United States." 18 Cong. Rec. 137.

[63] The Jenckes bill was introduced in the House on Dec. 20, 1865. Sumner had already on April 30, 1864, presented in the Senate a bill for a classified civil service. On June 13, 1866, the House Committee on Civil Service Reform reported out the Jenckes bill. It contained among other provisions a section requiring the proposed commission to prescribe, subject to the approval of the President, the misconduct or inefficiency which would be sufficient ground for removal and also the manner by which such charges were to be proved. This provision was retained in the succeeding bills sponsored by Jenckes in the House. The provision was expressly omitted from the Pendleton bill, which later became the Civil Service Act of 1883, in order not to endanger the passage of a measure for a classified civil service by impinging upon the controversial ground of removal. Senators Sherman and Brown attempted to secure legislation restricting removal by amendments to the Pendleton bill. 14 Cong. Rec. 210, 277, 364. In the First Session of the Thirty-ninth Congress no action was taken upon the Jenckes bill; but the bill was reintroduced in the following session on Jan. 29, 1867. An attempt on the part of Jenckes, after the initial passage of the Tenure of Office Act, to secure the passage of his bill resulted in the tabling of his scheme on Feb. 6, 1867, by a vote of 72 to 66.

was amended by the Conference Committee so as to apply to Cabinet officers; and having passed both Houses, was sent to the President on February 20, 1867, and passed over his veto on March 2, 1867.

The fact that the removal clause had been inserted in the Currency bill of 1863, shows that it did not originate in the contest of Congress with President Johnson, as has been sometimes stated. Thirty years before that, it had been recommended by Mr. Justice Story as a remedial measure, after the wholesale removals of the first Jackson administration. The Post Office Department was then the chief field for plunder. Vacancies had been created in order that the spoils of office might be distributed among political supporters. Fear of removal had been instilled in continuing office holders to prevent opposition or lukewarmness in support. Gross inefficiency and hardship had resulted. Several remedies were proposed. One of the remedies urged was to require the President to report to the Senate the reasons for each removal.[64] The second was to take the power of appointing postmasters from the Postmaster General and to confer it upon the President, subject to the consent of the Senate.[65] A third

[64] This measure appears to have been first suggested on May 4, 1826, in a bill which accompanied the report presented by Benton from the Select Committee of the Senate appointed to investigate executive patronage, when abuse of the power by President John Quincy Adams was apprehended. Sen. Doc. No. 88, 19th Cong., 1st sess., Ser. No. 128. On Mar. 23, 1830, Barton's resolution asserting the right to such information was reported. Sen. Doc. 103, 21st Cong., 1st sess., Ser. No. 193. On April 28, 1830, the proposal was renewed in a resolution introduced by Holmes. 6 Cong. Deb. 385. In 1835 it was embodied in the Executive Patronage Bill, which passed the Senate on two successive occasions, but failed of action in the House.

[65] This measure appears to have been first suggested by President Monroe in his message of Dec. 2, 1823. 41 Ann. Cong. 20. Its proposal for enactment into law was first suggested on May 4, 1826, by the report of the Select Committee appointed by the Senate on pos-

proposal was to require consent of the Senate also to removals.[66] Experience since has taught that none of these remedies is effective. Then, however, Congress adopted the second measure. The evil continued; and the struggle against the spoils system was renewed. The

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sible abuses of Executive Patronage. In 1832 the proposal was again brought forward by Vance of Ohio in the nature of an amendment to the postal legislation, 8 Cong. Deb. 1913. On Mar. 7, 1834, Clay's resolutions, that advocated the concurrence of the Senate in removals, also included a proposal for the appointment of postmasters by the President with the concurrence of the Senate. On Jan. 28, 1835, a report by the Senate Committee on Post Offices called attention to the extended removals of postmasters. Sen. Doc. No. 86, 23rd Cong., 2d sess., Ser. No. 268, p. 88. This report led to the introduction in 1835, and passage by the Senate of a bill reorganizing the Post Office which contained the proposal under consideration. The House having failed to act upon the 1835 bill, it was reintroduced at the next session and passed by both Houses. Act of July 2, 1836, c. 270, 5 Stat. 80. See also Sen. Doc. No. 362, 24th Cong., 1st sess., Ser. No. 283.

[66] This measure appears to have been first proposed in Congress by Clay on Mar. 7, 1834. 10 Cong. Deb. 834. In 1835, it was, in substance, embodied in an amendment proposed by him to the Executive Patronage Bill, which read: "That in all instances of appointment to office by the President, by and with the advice and consent of the Senate, the power of removal shall be exercised only in concurrence with the Senate; and, when the Senate is not in session, the President may suspend any such officer, communicating his reasons for the suspension during the first month of its succeeding session; and if the Senate concur with him, the officer shall be removed; but if it do not concur with him, the officer shall be restored to office." 11 Cong. Deb. 523. In 1836 when a Senate Committee of Commerce investigated the removal of a gauger for political reasons, Levi Woodbury, then Secretary of the Treasury, suggested the assumption of Congressional control over removals, saying: "The Department deems it proper to add that . . . a great relief would be experienced if . . . the power of original appointment and removal in all these cases should be vested in Congress, if the exercise of it there is deemed more convenient and safe, and, at the same time, constitutional." Sen. Doc. No. 430, 24th Cong., 1st sess., Ser. No. 284, p. 30.

other crude remedies which had been rejected—accountability of the President to the Senate [67] and the requirement of its consent to removals [68]—were again considered.

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[67] On July 1, 1841, Benton again reintroduced a proposal of this nature. Cong. Globe, 27th Cong., 1st sess., 63. On May 23, 1842, a Select Committee on Retrenchment reported to the House on the necessity of diminishing and regulating executive patronage, saying "they entertain no doubt of the power of Congress to prescribe, and of the propriety of prescribing, that, in all cases of removal by the President, he shall assign his reasons to the Senate at its next session." House Rep. No. 741, 27th Cong., 2d sess., Ser. No. 410, p. 5. See also Report of July 27, 1842, House Rep. No. 945, 27th Cong., 2d sess., Ser. No. 410; 5 Ex. Journ. 401. On Jan. 3, 1844, after an attempt to impeach President Tyler for misusing the appointing power had failed, Thomasson in the House again sought to secure the adoption of such a measure. On December 24, 1849, after the Post Office Department under Taylor's administration had recorded 3,406 removals, Bradbury proposed a resolution requiring the President to give the number and reasons for removals made from the beginning of his term of office. Senator Mangum in order to cut short debate on the resolution contended that it was an unconstitutional invasion of executive powers and called for a test vote upon the resolution. The Senate divided 29 to 23 in upholding its right to demand reasons for removals. Cong. Globe, 31st Cong., 1st sess., 160. On Jan. 4, 1850, the Senate adopted a resolution calling for a report upon the number and reasons for removals of deputy postmasters. *Ibid.* 100.

[68] The character that this movement to restrict the power of removal had assumed in consequence of the continuance of the spoils system is illustrated by the remarks of Bell in the Senate in 1850: "To restrain this power by law I would urge as one of the greatest reforms of the age, so far as this Government is concerned. . . . Sir, I repeat, that to restrain by law this unlimited, arbitrary, despotic power of the Executive over the twenty or thirty thousand valuable public officers of the country—the tendency of which is to make them slaves of his will—is the greatest reform demanded by the true interest of the country, no matter who may at any time be the tenant of the White House." Cong. Globe, 31st Cong., 1st sess., App. 1043. Restrictions were twice advocated in the official utterances of President Tyler. 4 Messages and Papers of the Presidents, 50, 89. See also Report of June 15, 1844, by Sen. Com. on Retrench-

And both continued to be urged upon Congress, even after the fourth and the more promising remedy—enquiry into fitness for office and competitive examinations—had been proposed. For a generation, the reformers failed to secure the adoption of any further measure.

The first substantial victory of the civil service reform movement, though a brief one, was the insertion of the removal clause in the Currency bill of 1863.[69] The next forward step was taken by the Consular and Diplomatic Appropriation Act, June 20, 1864, c. 136, § 2, 13 Stat. 137, 139–140, also approved by President Lincoln, which contained a provision that consular clerks should be appointed by the President after examination, and that "no clerk so appointed shall be removed from office except for cause stated in writing, which shall be submitted to congress at the session first following such removal."[70] It was in the next Congress that the removal clause was applied generally by the Tenure of Office Act. The long delay in adopting legislation to curb removals was not because Congress accepted the doctrine that the Consti-

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ment; Sen. Doc. 399, 28th Cong., 1st sess., Ser. No. 437, p. 55; Resolution of Dec. 17, 1844, by Grider in the House, Cong. Globe, 28th Cong., 2d sess., 40.

[69] Act of Feb. 25, 1863, c. 58, § 1, 12 Stat. 665.

[70] By the Act of Mar. 3, 1853, c. 97, § 3, 10 Stat. 189, 211, clerks in the departments of the Treasury, War, Navy, Interior and Post Office, were to be classified and appointments to the various classes were to be made only after examination by a select board. This scheme was later abandoned after it became evident that the examinations prescribed were conducted arbitrarily and with no attempt to determine the fitness of candidates for positions. Fish, Civil Service and Patronage, 183. By the Act of Aug. 18, 1856, c. 127, § 7, 11 Stat. 52, 55, the appointment of twenty-five consular pupils was authorized and examinations were to be conducted to determine the fitness of applicants for appointment. This provision was, however, stricken from the diplomatic and consular appropriation bill in the next session of Congress. The principle was not returned to again until the Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139.

tution had vested in the President uncontrollable power over removal. It was because the spoils system held sway.

The historical data submitted present a legislative practice, established by concurrent affirmative action of Congress and the President, to make consent of the Senate a condition of removal from statutory inferior, civil, executive offices to which the appointment is made for a fixed term by the President with such consent. They show that the practice has existed, without interruption, continuously for the last fifty-eight years; that, throughout this period, it has governed a great majority of all such offices; that the legislation applying the removal clause specifically to the office of postmaster was enacted more than half a century ago; and that recently the practice has, with the President's approval, been extended to several newly created offices. The data show further, that the insertion of the removal clause in acts creating inferior civil offices with fixed tenures is part of the broader legislative practice, which has prevailed since the formation of our Government, to restrict or regulate in many ways both removal from and nomination to such offices. A persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction, in the absence of any decision by any court to the contrary. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469.

The persuasive effect of this legislative practice is strengthened by the fact that no instance has been found, even in the earlier period of our history, of concurrent affirmative action of Congress and the President which is inconsistent with the legislative practice of the last fifty-eight years to impose the removal clause. Nor has any instance been found of action by Congress which in-

volves recognition in any other way of the alleged uncontrollable executive power to remove an inferior civil officer. The action taken by Congress in 1789 after the great debate does not present such an instance. The vote then taken did not involve a decision that the President had uncontrollable power. It did not involve a decision of the question whether Congress could confer upon the Senate the right, and impose upon it the duty, to participate in removals. It involved merely the decision that the Senate does not, in the absence of legislative grant thereof, have the right to share in the removal of an officer appointed with its consent; and that the President has, in the absence of restrictive legislation, the constitutional power of removal without such consent. Moreover, as Chief Justice Marshall recognized, the debate and the decision related to a high political office, not to inferior ones.[71]

Nor does the debate show that the majority of those then in Congress thought that the President had the uncontrollable power of removal. The Senators divided equally in their votes. As to their individual views we lack knowledge; for the debate was secret.[72] In the House only 24 of the 54 members voting took part in the debate. Of the 24, only 6 appear to have held the opinion that the President possessed the uncontrollable power of removal. The clause which involved a denial of the claim that the Senate had the constitutional right to participate in removals was adopted, so far as appears, by aid of the votes of others who believed it expedient for

[71] Chief Justice Marshall said of the proceedings of 1789: "In organizing the departments of the executive, the question in what manner the high officers who filled them should be removable, came on to be discussed." 5 Marshall, Life of Washington, 196.

[72] Of the ten Senators who had been members of the Constitutional Convention of 1787, four voted against the bill. A fifth, Bassett, changed sides during the debate. Maclay, Sketches of Debate, 110.

Congress to confer the power of removal upon the President alone.[73] This is indicated both by Madison's appeal for support[74] and by the action taken on Benson's motions.[75]

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[73] The six who held that the Constitution vested a sole power of removal in the President were Baldwin, 1 Ann. Cong. 557–560; Benson, 1 *ibid.* 505–507; Boudinot, 1 *ibid.* 526–532; Clymer, 1 *ibid.* 489; Madison, 1 *ibid.* 546; Vining. 1 *ibid.* 585. Madison, at first, considered it subject to Congressional control. 1 Ann. Cong. 374–375. Seven held that the power of removal was a subject for Congressional determination and that it was either expedient or inexpedient to grant it to the President alone. Hartley, 1 Ann. Cong. 585; Lawrence, 1 *ibid.* 583; Lee, 1 *ibid.* 523–526; Sedgwick, 1 *ibid.* 582–583; Sherman, 1 *ibid.* 491–492; Sylvester, 1 *ibid.* 560–563; Tucker, 1 *ibid.* 584–585. Five held that the power of removal was constitutionally vested in the President and Senate. Gerry, 1 Ann. Cong. 502; Livermore, 1 *ibid.* 477–479; Page, 1 *ibid.* 519–520; Stone, 1 *ibid.* 567; White, 1 *ibid,* 517. Two held that impeachment was the exclusive method of removal. Jackson, 1 Ann. Cong. 374, 529–532; Smith, of South Carolina, 1 Ann. Cong. 457, 507–510. Three made desultory remarks, Goodhue, 1 Ann. Cong. 378, 533–534; Huntington, 1 Ann. Cong. 459; and Scott, 1 Ann. Cong. 532–533, which do not admit of definitive classification. Ames was only certain that the Senate should not participate in removals, and did not differentiate between a power vested in the President by the Constitution and a power granted him by the legislature. 1 Ann. Cong. 473–477, 538–543. He inclined, however, towards Madison's construction. 1 Works of Fisher Ames, 56. During the earlier debate upon the resolutions for the creation of Executive Departments, Bland had contended that the Senate shared in the power of removal. 1 Ann. Cong. 373–374. The conclusion that a majority of the members of the House did not hold the view that the Constitution vested the sole power of removal in the President was expressed by Senator Edmunds. 3 Impeachment of Andrew Johnson, 84. It had been expressed twenty years earlier by Lockwood, J., of the Supreme Court of Illinois, in a case involving a similar question and decided adversely to Madison's contention. *Field* v. *People,* 2 Scamm. 79, 162–173.

[74] Madison's plea for support was addressed not only to those who conceived the power of removal to be vested in the President, but also to those who believed that Congress had power to grant the authority to the President and that under the circumstances it was

It is true that several Presidents have asserted that the Constitution conferred a power of removal uncontrollable

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expedient to confer such authority. After expressing his own views on the subject, he continued: "If this is the true construction of this instrument, the clause in the bill is nothing more than explanatory of the meaning of the Constitution, and therefore not liable to any particular objection on that account. If the Constitution is silent, and it is a power the Legislature have a right to confer, it will appear to the world, if we strike out the clause, as if we doubted the propriety of vesting it in the President of the United States. I therefore think it best to retain it in the bill." 1 Ann. Cong. 464.

[75] The initial vote of 34 to 20, defeating a motion to strike out the words "to be removable by the President," was indecisive save as a determination that the Senate had no constitutional right to share in removals. Madison, June 22, 1789, 1 Ann. Cong. 578–579. "Indeed, the express grant of the power to the president rather implied a right in the legislature to give or withhold it at their discretion." 5 Marshall, Life of Washington, 200. Benson, therefore, proposed to remove this ambiguity by striking out the words "to be removable by the President," and inserting "whenever the said principal officer shall be removed from office by the President of the United States," thus implying the existence of the power in the President irrespective of legislative grant. The motions were successful and their adoption has been generally interpreted as a legislative declaration of Benson's purpose. Such interpretation, although oft repeated, is not warranted by the facts of record. The individual votes on these two motions are given. An examination of the votes of those whose opinions are also on record shows that Benson's first motion succeeded only as a result of coalition between those who accepted Madison's views and those who considered removal subject to Congressional control but deemed it advisable to vest the power in the President. The vote on Benson's second motion to strike out the words "to be removable by the President" brought forth a different alignment. The minority now comprised those who, though they believed the grant of power to be expedient, did not desire to imply the existence of a power in the President beyond legislative control. Whereas the majority exhibits a combination of diverse views—those who held to Madison's construction, those who initially had sought to strike out the clause on the ground that the Senate should share in removals, and those who deemed it unwise to make any legislative declaration of the Constitution. Thus none

by Congress.[76] But of the many statutes enacted since the foundation of our Government which in express terms controlled the power of removal, either by the clause here in question or otherwise, only two were met with a veto: The Tenure of Office Act of 1867, which related to high political officers among others, and the Budget Act of 1920, which denied to the President any participation in the removal of the Comptroller and Assistant Comptroller. One was passed over the President's veto; the other was approved by the succeeding President. It is true also that several Presidents have at times insisted that for the exercise of their power they were not accountable to the Senate.[77] But even these Presidents

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of the three votes in the House revealed its sense upon the question whether the Constitution vested an uncontrollable power of removal in the President. On the contrary the votes on Benson's amendments reveal that the success of this endeavor was due to the strategy of dividing the opposition and not to unanimity of constitutional conceptions.

[76] President's Jackson, 3 Messages and Papers of the Presidents, 133; Johnson, 6 *ibid.* 492; Cleveland, 8 *ibid.* 379; Wilson, 59 Cong. Rec. 8609.

[77] On Feb. 2, 1835, the Senate adopted a resolution requesting the President to communicate to the Senate copies of the charges against Gideon Fitz, surveyor-general, in that such information was necessary for its constitutional action upon the nomination of his successor. 4 Ex. Journ. 465. On Feb. 10, 1835, President Jackson refused to comply with these alleged "unconstitutional demands." 4 Ex. Journ. 468. On Jan. 25, 1886, the Senate adopted a resolution directing the Attorney General to transmit copies of documents on file in the Department of Justice relating to the management of the office of district attorney for the southern district of Alabama. J. D. Burnett had been nominated to the office in place of G. M. Duskin suspended. 25 Ex. Journ. 294. On Feb. 1, 1886, a letter from the Attorney General was laid before the Senate refusing to accede with the request by direction of the President. On Mar. 1, 1886, President Cleveland in a message to the Senate denied the constitutional right of the Senate to demand such information. 8 Messages and Papers of the Presidents, 375.

have at other times complied with requests that the ground of removal of inferior officers be stated.[78] Many of the Presidents have furnished the desired information

[78] During March 1830, prior to the Fitz episode, three resolutions to request the President to communicate grounds for the removal of inferior officials failed of adoption in the Senate. 4 Ex. Journ. 75, 76, 79. However, during April 1830, in the case of nominations sent to the Senate for confirmation, resolutions requesting the President to communicate information relative to the character and qualifications of the appointees, were adopted and complied with by President Jackson. 4 *ibid.* 86, 88, 92.

The instances of President Johnson's compliance with the second section of the Tenure of Office Act, requiring the communication of reasons for the suspension of inferior officials during the recess of the Senate, have been enumerated. See Notes 23 and 24, *supra.* President Johnson also complied with a resolution adopted by the Senate on Dec. 16, 1867, requesting him to furnish the petitions of Idaho citizens, filed with him, remonstrating against the removal of Governor Ballard. 16 Ex. Journ. 109, 121. Also, on April 5, 1867, his Attorney General complied with a Senate resolution calling for papers and other information relating to the charges against a judge of Idaho Territory, whose removal the President was seeking through the appointment of a successor. 15 *ibid.* 630, 644. On Feb. 18, 1867, his Postmaster General in compliance with a House resolution of Dec. 6, 1866, transmitted the number and reasons for the removals of postmasters, appointed by the President, between July 28, 1866, and Dec. 6, 1866. House Ex. Doc. No. 96, 39th Cong., 2d sess., Ser. No. 1293. His Secretary of the Interior also complied with a House resolution requesting information as to removals and reasons therefor in the department. House Ex. Doc. No. 113 39th Cong., 2d sess., Ser. No. 1293.

Prior to the date on which President Cleveland upheld his right to refuse the Senate information as to the conduct of a suspended official, his Secretary of the Treasury twice complied with requests of the Senate for such information. 25 Ex. Journ. 312, 317. These requests were couched in substantially the same form as that which was refused in the Duskin case. Subsequent to that date, compliances with similar resolutions are recorded in four further cases, two by the Secretary of the Treasury, one by the Postmaster General and one by the Attorney General. 25 Ex. Journ. 362, 368, 480, 559.

without questioning the right to request it.[79] And neither the Senate nor the House has at any time receded

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[79] On Mar. 2, 1847, President Polk complied with a Senate resolution requesting reasons and papers relating to the failure to send in Captain H. Holmes' name for promotion. 7 Ex. Journ. 227. On Sept. 2, 1850, President Fillmore complied with a Senate resolution requesting the President to communicate correspondence relating to "the alleged resignation" of Lieut. E. C. Anderson. 8 *ibid.* 226. Fillmore, in compliance with a Senate resolution of Aug. 14, 1850, laid before the Senate a report of the Postmaster General communicating the charges on file against the deputy postmaster at Milwaukee. 8 *ibid.* 220. Nominations having been made for the collectorships of New York and Chicago and the former incumbents suspended, Edmunds on Nov. 26, 1877, proposed a resolution directing the Secretary of the Treasury to transmit all papers bearing upon the expediency of removing the collectors. On Jan. 15, 1879, the Secretary of the Treasury communicated to the Senate an official report, and on Jan. 31, 1879, President Hayes forwarded his reasons for the suspensions. 21 *ibid.* 140, 455, 497.

Compliances with Senate resolutions directed to the Heads of Departments relative to the removal of Presidential appointees are also on record. In response to a House resolution of Feb. 13, 1843, requesting the charges against Roberts and Blythe, collectors, and the names of the persons who petitioned for their removal, the Secretary of the Treasury transmitted the material that he had in his control. House Doc. No. 158, 27th Cong., 3rd sess., Ser. No. 422. On Jan. 14, 1879, the Secretary of the Treasury complied with a Senate resolution requesting the charges on file against the Supervising Inspector-General of Steamboats. 21 Ex. Journ. 454. On Jan. 20, 1879, the Secretary of the Treasury complied with a Senate resolution calling for the papers showing why Lieutenant Devereux was discharged from the Revenue Marine Service. 21 *ibid.* 470. The Secretary of the Navy complied with a Senate resolution of Feb. 25, 1880, asking why Edward Bellows was dropped from the roll of paymasters. Sen. Doc. No. 113, 46th Cong., 2d sess., Ser. No. 1885.

Presidents Van Buren and Tyler also complied with resolutions requesting the number of removals. Sen. Doc. No. 399, 28th Cong., 1st sess., Ser No. 437, p. 351; House Doc. No. 48, 27th Cong., 1st sess., Ser. No. 392.

Senate resolutions, occasioned by the nomination of the successor in place of a former incumbent, requesting information as to the

from the claim that Congress has power both to control by legislation removal from inferior offices and to require the President to report to it the reasons for removals made therefrom.[80] Moreover, no instance has been found in which a President refused to comply with an Act of Congress requiring that the reasons for removal of an inferior officer be given. On the contrary, President Cleveland, who refused to accede to the request of the Senate that he state the reasons for the removal of Duskin, had, in the case of Burchard, complied, without protest or reserva-

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conduct or ability of the successor, have been complied with by Presidents Monroe on Feb. 1, 1822 (3 Ex. Journ. 273); Jackson on April 12, and 15, 1830 (4 *ibid.* 88, 92), and on April 24, 1834 (4 *ibid.* 390); by Tyler on June 29, 1842 (6 *ibid.* 97; by Polk on June 23, 1848 (7 *ibid.* 435); by Fillmore on Sept. 16, 1850 (8 *ibid.* 232); by Buchanan on Mar. 2, 1858 (10 *ibid.* 237); by Grant on Dec. 21, 1869 (17 *ibid.* 326); and by Heads of Departments under Polk on June 23, 1848 (7 *ibid.* 435); under Fillmore on Sept. 25, 1850, and Feb. 17, 1853 (8 *ibid.* 250, 9 *ibid.* 33); under Lincoln on Jan. 22, 1862, and on Feb. 23, 1865 (12 *ibid.* 95, 14 *ibid.* 135). The practice appears to have been suggested by President Washington. The Senate having rejected a nomination, President Washington on Aug. 7, 1789, in nominating a successor, said: "Permit me to submit to your consideration, whether, on occasions when the propriety of nominations appears questionable to you, it would not be expedient to communicate that circumstance to me, and thereby avail yourselves of the information which led me to make them, and which I would with pleasure lay before you." 1 Ex. Journ. 16.

[80] The Executive Patronage Bill, containing such a requirement, passed the Senate on Feb. 21, 1835, and on Feb. 3, 1836. A test vote on the Senate's right in 1850 is also on record. See Note 67, *supra.* Following the protest of President Cleveland, resolutions condemnatory of the Attorney General's refusal "under whatever influence" to communicate the information requested were favorably reported to the Senate, debated at length and passed. Among the members of the committee, advocating the adoption of the resolutions, were Hoar and Evarts, the two most energetic opponents of the Tenure of Office Act. Sen. Rep. No. 135, 49th Cong., 1st sess., Ser. No. 2358. The Acts of 1864 and 1873, approved by Presidents Lincoln and Grant, embody such a requirement. See Note 33, *supra.*

tion, with the requirement of the Act of February 12, 1873, c. 131, § 1, 17 Stat. 424 (now Rev. Stat. § 343) that the reasons for the removal of the Director of the Mint be communicated by him to the Senate. 25 Ex. Journ. 242. A construction given to the Constitution by the concurrent affirmative action of Congress and the President continued throughout a long period without interruption should be followed despite the isolated utterances, made in the heat of political controversies not involving the question here in issue by individual Presidents supported only by the advice of the Attorney General.[81]

The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial. Obviously the President cannot secure full execution of the

[81] Attorneys General Legare, Clifford, and Crittenden seem to have been of the opinion that the President possessed an absolute power of removal. 4 Op. A. G. 1, 603; 5 *ibid.* 288. Legare, however, having occasion to consider Story's contention that the power of removal might be restricted by legislation with respect to inferior officers, said that he was "not prepared to dissent from any part of this sweeping proposition." 4 *ibid.* 165, 166. In 1818 Attorney General Wirt in holding that where an Act of Congress gave the President power to appoint an officer, whose tenure of office was not defined, that officer was subject to removal by the President, said: "Whenever Congress intend a more permanent tenure, (during good behaviour, for example,) they take care to express that intention clearly and explicitly. . . ." 1 *ibid.* 212, 213. Following the passage of the Tenure of Office Act the subject was considered by Attorney General Evarts, who disposed of the problem "within the premises of the existing legislation." 12 *ibid.* 443, 449. In 1873 Attorney General Akerman refused to concede the President a power of removal in that under that Act he was limited to a power of suspension. 13 *ibid.* 300. In 1877 Attorney General Devens concurred in the provisions of the Tenure of Office Act restoring a suspended officer to his office upon the failure of the Senate to act upon the confirmation of his successor. 15 *ibid.* 375.

laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or, because Congress, having created the office, declines to make the indispensable appropriation. Or, because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. Compare *Kendall* v. *United States,* 12 Pet. 524, 613, 626.

Checks and balances were established in order that this should be "a government of laws and not of men." As White said in the House, in 1789, an uncontrollable power of removal in the Chief Executive "is a doctrine not to be learned in American governments." Such power had been denied in Colonial Charters,[82] and even under Pro-

[82] The Connecticut Charter of 1662, vested the appointment of practically all officers in the assembly and provided that such officers were to be removable by the Governor, Assistants and Company for any misdemeanor or default. The Rhode Island Charter of 1663 contained the same provisions. The Massachusetts Charter of 1691 provided for the appointment of officers by and with the advice and consent of the Council. Under Governors Phipps and Stroughton the council asserted its rights over appointments and dismissals, and in 1741 Shirley was prevented from going back to the earlier arbitrary practice of Governor Belcher. Spencer, Constitutional Conflict in Massachusetts, 28. The Georgia Charter of 1732 provided that the common council should have power to nominate and appoint and "at their will and pleasure to displace, remove and put out such treasurer or treasurers, secretary or secretaries, and all such other officers, ministers and servants."

prietary Grants[83] and Royal Commissions.[84] It had been denied in the thirteen States before the framing of the Federal Constitution.[85] The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide; and this clause was construed by Alexander Hamilton in The Federalist, No. 77, as requiring like consent to removals.[86] Limiting further execu-

[83] As early as 1724 Mrs. Hannah Penn in her instructions to Sir William Keith, governor of Pennsylvania, protested against his dismissal of the Secretary without seeking the advice of his council. The practice of seeking such advice continued in later years. Shepherd, Proprietary Government in Pennsylvania, 321, 370.

[84] In the Royal Colonies there was a recognized tendency to guard against arbitrariness in removals by making the governor responsible to the home government instead of the local representative assembly. In New Hampshire the first and second Andros Commissions entrusted the power to the governor alone, but the Bellomont Commission of 1697, the Dudley Commission of 1702, the Shute Commission of 1716, the Burnet Commission of 1728, the Belcher Commission of 1729, the Wentworth Commission of 1741, and the John Wentworth Commission of 1766 were accompanied with instructions requiring either that removals be made only upon good and sufficient cause or upon cause signified to the home government in the "fullest & most distinct manner." In Virginia similar instructions accompanied the issuance of commissions to Governor Howard in 1683 and to Governor Dunmore in 1771.

[85] Smith of South Carolina, June 17, 1789, 1 Ann. Cong. 471; Gerry, June 17, 1789, 1 Ann. Cong. 504. See Note 9, *supra*.

[86] Hamilton's opinion is significant in view of the fact that it was he who on June 5, 1787, suggested the association of the Senate with the President in appointments, as a compromise measure for dealing

tive prerogatives customary in monarchies, the Constitution empowered Congress to vest the appointment of inferior officers, "as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Nothing in support of the claim of uncontrollable power can be inferred from the silence of the Convention of 1787 on the subject of removal. For the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected.[87] In America, as in England, the conviction prevailed then that the people must look to representative

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with the appointment of judges. 1 Farrand, Records of the Federal Convention, 128. The proposition that such appointments should be made by and with the advice and consent of the Senate was first brought forward by Nathaniel Gorham of Massachusetts, "in the mode prescribed by the constitution of Masts." 2 *ibid.* 41. Later this association of the President and the Senate was carried over generally to other appointments. The suggestion for the concurrence of the Senate in appointments of executive officials was advanced on May 29 by Pinckney in his "draught of a foederal government" and by Hamilton in resolutions submitted by him on June 18, 1787, 1 *ibid.* 292; 3 *ibid.* 599.

[87] Rogers, Executive Power of Removal, 11, 39. On August 6, 1787, the Committee of Five reported the draft of the Constitution that in Art. X, Sect. 2, provided for a single executive who "shall appoint officers in all cases not otherwise provided for by this Constitution." 2 Farrand, Records of the Federal Convention, 185. On August 20 propositions were submitted to the Committee of Five for the creation of a Council of State consisting of the Chief Justice, the Secretaries of domestic affairs, commerce and finance, foreign affairs, war, marine and state. All the Secretaries were to be appointed by the President and hold office during his pleasure. 2 *ibid.* 335–337. That proposition was rejected because "it was judged that the Presidt. by persuading his Council—to concur in his wrong measures, would acquire their protection. . . ." 2 *ibid.* 542. The criticism of Wilson, who had proposed the Council of State, and Mason of the Senate's participation in appointments was based upon this rejection. The lack of such a Council was the "fatal defect" from which "has arisen the improper power of the Senate in the appointment of public officers." 2 *ibid.* 537, 639.

assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.

PALMETTO FIRE INSURANCE COMPANY *v.* CONN.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

CHRYSLER SALES CORPORATION *v.* SPENCER, INSURANCE COMMISSIONER.

UTTERBACK-GLEASON COMPANY *v.* SPENCER, INSURANCE COMMISSIONER.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE.

CLARK MOTOR COMPANY *v.* JOHNSON, COMMISSIONER OF INSURANCE.

CHRYSLER SALES CORPORATION *v.* JOHNSON, COMMISSIONER OF INSURANCE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

Nos. 255, 273, 274, 286, 287. Argued October 11, 1926.—Decided October 25, 1926.

1. By the terms of a "blanket" contract entered into in Michigan between a South Carolina insurance company and a Michigan sales company, engaged in marketing all the automobiles of a particular make, the insurance company insured future purchasers of the cars against fire and theft; the insurance was to become

automatically effective whenever anyone bought a car and took delivery or a bill of sale, without regard to the wish of the purchaser; the sales company was to make monthly reports to the insurance company of all cars for which insurance was thus provided and pay premiums accordingly, in Michigan; and the insurance company was to send certificates of insurance to the respective purchasers.

Held, that where such insurance became effective through sales of cars in other States, though sold by distributors and retail dealers who owned them and were not agents of the sales company, laws of those States regulating and taxing insurance were constitutionally applicable to such local transactions, and that the fact that the cost of the insurance was taken up in the price of the cars so sold did not prevent the insurance from being reached. P. 304.

2. The courts of the United States should not go beyond necessity to instruct officials of a State as to the meaning of a state law. P. 305.

9 F. (2d) 202; *Id.* 666; *Id.* 674—affirmed.

THE first of these cases is an appeal from an order of the District Court refusing an interlocutory injunction, in a suit by the Palmetto Fire Ins. Co., a South Carolina corporation, to restrain Conn, the Superintendent of Insurance of Ohio, from revoking the plaintiff's license to do business in Ohio. The other four cases are appeals from like orders, in suits brought in Maine and Wisconsin, by dealers in automobiles, to enjoin the insurance commissioners of those States from sending out letters, etc., accusing the plaintiffs of violating the local insurance laws, and announcing publicly that insurance on the cars they sold was void; and to enjoin them from bringing criminal prosecutions, or actions for penalties, or otherwise interfering with the sale of the cars in those two States, respectively. Johnson, Commissioner of Insurance, appellee in Nos. 286 and 287, was substituted in this Court for Smith, his predecessor in office.

Mr. Hartwell Cabell, with whom *Messrs. Wm. O. Henderson, Karl E. Burr, Milton B. Ignatius*, and *James M. Lown* were on the brief, for appellant in No. 255.

The Court had jurisdiction to grant relief. *St. Louis R. Co.* v. *Cross,* 171 Fed. 480; *Harrison* v. *St. Louis R. Co.,* 232 U. S. 318.

A State cannot revoke its license to a foreign corporation on account of the exercise by the corporation of a constitutional right. *Lafayette Ins. Co.* v. *French,* 18 How. 404; *Ins. Co.* v. *Morse,* 20 Wall. 445; *Terral* v. *Burke Const. Co.,* 257 U. S. 529; *Western Union* v. *Foster,* 247 U. S. 105; *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346; *Fidelity Co. v. Tafoya,* 270 U. S. 426; *Doyle* v. *Cont. Ins. Co.,* 94 U. S. 535; *Security Ins. Co.* v. *Prewitt,* 202 U. S. 246. A state statute which interferes with or curtails the freedom of contract outside the State is unconstitutional and void. *Allgeyer* v. *Louisiana,* 165 U. S. 578; *N. Y. Life* v. *Head,* 234 U. S. 149; *N. Y. Life* v. *Dodge,* 246 U. S. 357; *Compress Co.* v. *Arkansas,* 260 U. S. 346; *Aetna Ins. Co.* v. *Dunken,* 266 U. S. 389; *Stone* v. *Penn Yan Ry.,* 197 N .Y. 279; *Huntington* v. *Sheehan,* 206 N. Y. 486; *Palmetto Ins. Co.* v. *Beha,* 13 Fed. (2d) 500.

The Chrysler-Palmetto policy is a Michigan contract and all business thereunder is transacted by the Palmetto in Michigan and is beyond the jurisdiction and control of Ohio and its officers. *Palmetto Ins. Co.* v. *Beha, supra.* A policy of insurance and a certificate of insurance issued under an open policy are two entirely different things. One is a unilateral contract between the designated parties; the other is the evidence of a beneficial interest in a third party under a contract made between A. and B. *Diamond Alkali Co.* v. *Bourgeois,* 3 K. B. Div. 1921; *Connor* v. *Manchester Assur. Co.,* 130 Fed. 743. Since *Paul* v. *Virginia,* 8 Wall. 168, it may be taken as settled so far as our law is concerned, that insurance is not a "commodity;" that it does not attach to the subject of insurance, be it a building, a vessel, or any other kind of property, but is a personal contract of indemnity. In the

Chrysler-Palmetto plan, the insurance does not attach to the car. The purchaser is no party to the contract. The contract was made for his benefit by the Chrysler Sales Company and the Palmetto long before his purchase of a Chrysler car brought him within the designated class of persons who were to profit by the insurance. He is not called upon to accept and although he need not avail himself of the "cover" he cannot by refusal prevent the insurance coming into effect.

Nor is the dealer who sells the car a party to any insurance transaction. He does not tender a proposal to insure, nor does he give insurance along with the car. The mere fact that upon a sale by him to a third person of a piece of property belonging to him, this third person comes within a class of beneficiaries named in a contract between other parties, in the making of which he had no part, cannot in itself constitute a transaction under that contract. Open or running policies "for the benefit of whom it may concern" are today a common form of insurance. It would be absurd to say that a purchasing agent or merchandise broker who buys for his principal, is engaged in the insurance business, and must take out an insurance broker's or agent's license, simply because the moment he makes his purchase his principal is automatically insured under an open policy, with the taking out of which the agent or broker had nothing whatever to do.

The insurance contract under discussion was made in Detroit, Michigan, the certificates are mailed from there, and the losses paid from there. The insurance is not in the form of an offer to insure, as seems to have been the thought of the judges who sat in Maine and Wisconsin, but a *fait accompli,* which needed no tender or acceptance on the part of either dealer or purchaser. The Palmetto is bound regardless of what either dealer or purchaser wants or says or does. The dealer has no authority from the Palmetto, gets no remuneration, or commission, and

the purchaser has no option. There is no element of compulsion involved in the insurance.

There is here no restraint of trade under the Ohio statutes. The procedure required by the Ohio law for determining the financial condition of insurance companies has not been followed and the charge that the insurance company is "in an unsound condition," in the absence of some testimony is not available as the basis for the revocation of a license.

Mr. Duane R. Dills for the appellants, in Nos. 273, 274, 286, and 287.

Chrysler dealers in Wisconsin and Maine are independent automobile merchants and not insurance agents. They sell cars at retail which they had previously bought and paid for at wholesale. The dealers had no voice in the making and no control over the operation of the Michigan policy. *Palmetto Ins. Co.* v. *Beha,* 13 Fed. (2d) 500, correctly states the law in respect of the Michigan blanket policy and dealers' acts in the sale of the cars.

The Wisconsin and Maine insurance statutes by their terms are not applicable to the acts of the dealers in selling the cars, and do not sanction the threatened acts of the Commissioners of Insurance of those States. The dealers do not effect insurance, do not collect premiums nor forward applications for insurance; they receive no remuneration for effecting insurance and make no fraudulent representations in respect of insurance; the dealers receive only their usual profit for the sale of their own property. The fact that Chrysler in a foreign State had included the cost of insurance as an overhead expense in the wholesale price of the cars to the dealer does not constitute the paying of a premium by the dealer in the purchase at wholesale of the cars, nor the collecting of a premium by the dealer from the retail purchaser when the car is sold at retail for sufficient to reimburse him for his wholesale price plus his usual profit. The dealers

are not agents of the insurance company; they have no communication with it and have no authority to act for it.

The insurance is by virtue of the Michigan contract. The Michigan policy is a completed contract notwithstanding the postponement of its operative effect until the retail sale of a car. The operative effects of "for whom it may concern" policies usually are postponed both as to the identification of the property covered and of the person or persons insured. See *Hagan* v. *Scottish Union Ins. Co.*, 186 U. S. 423. The acceptance of the benefits of the Michigan policy by the retail purchasers and other beneficiaries does not constitute the making of several new contracts. Their rights are those of a third party to a contract made for their benefit. *Nutting* v. *Massachusetts*, 183 U. S. 553; *Amer. Ins. Co.* v. *King Lumber Co.*, 250 U. S. 2; *Hooper* v. *California*, 155 U. S. 648; *Cain* v. *State*, 103 Miss. 701; *Bartlett* v. *Rotchschild*, 214 Pa. 421; *Anderson* v. *Northwestern Ins. Co.*, 51 N. D. 917; *State* v. *Arlington*, 157 N. C. 640; *Vertrees* v. *Head*, 138 Ky. 83; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346; *Hunter* v. *Mut. Ins. Co.*, 218 U. S. 573; *Prov. Sav. Soc.* v. *Kentucky*, 239 U. S. 103; *State* v. *Int. Paper Co.*, 96 Vt. 506; *Stone* v. *Old Colony Ry. Co.*, 212 Mass. 459.

The retail sale of cars covered by the policy does not subject the insurance company to liability for taxes in Wisconsin and Maine. See *St. Louis Compress Co.* v. *Arkansas, supra.* Nor do the dealers become agents of the insurance company for the purpose of service of process. See *Minn. Comm. Assn.* v. *Benn*, 261 U. S. 140. If the Wisconsin and Maine statutes should be so construed as to penalize the acts done by the dealers in these cases, they would be unconstitutional to that extent. These cases come within the principles laid down by this Court in *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Minn. Comm. Assn.* v. *Benn, supra; Aetna Ins. Co.* v. *Dunken*, 266 U. S. 389, and are to be distinguished from *Hooper* v.

California, 155 U. S. 648; *Nutting* v. *Massachusetts,* 183 U. S. 553, in that the dealers do no overt act of insurance within the States of Wisconsin and Maine other than to conduct their legitimate business of selling cars.

The States and the officers of the States cannot use their powers to accomplish a forbidden result; and the attempt of the Insurance Commissioners to prevent the sale of Chrysler cars in their respective States because Chrysler in a foreign State included, as an overhead expense, the cost of insurance in the wholesale price of the car, amounts to a placing of a burden on interstate commerce. While insurance is not in itself a commodity the subject of interstate commerce, nevertheless an attempt to regulate it when effected in a foreign State because its cost entered into the price of the commodity is an interference with the sale of the commodity itself in interstate commerce. See *Thames Ins. Co.* v. *United States,* 237 U. S. 19; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189; *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203. The Commissioners of Insurance have no constitutional right to arbitrarily interfere with the legitimate business of a Chrysler dealer in the sale of his car.

Mr. C. S. Younger, with whom *Mr. C. C. Crabbe* was on the brief, for the appellee in No. 255.

The action of the plaintiff, coming about four hours after the license had been revoked by the defendant, rendered the only question then remaining a moot one. *Miner* v. *Witt,* 82 O. S. 237; *District Board* v. *State,* 92 O. S. 507; *Pollitz* v. *Pub. Util. Comm.,* 93 O. S. 483; *State ex rel. Campbell* v. *Grimes,* 94 O. S. 457; *Owens* v. *Board of Education,* 95 O. S. 407; *O'Dwyer* v. *Ohio,* 109 O. S. 621; *Kimball* v. *Kimball,* 174 U. S. 158; *People ex rel. Kingsland* v. *Clark,* 70 N. Y. 518.

The power of a State to regulate business affected with a public interest, within its borders, whether of a domestic or a foreign corporation, is not open to question. The

State has power, either wholly to exclude a foreign insurance company from doing business within its limits, or to impose on it such terms as it deems proper as a condition precedent to its right to do business within its limits. *Whitfield* v. *Aetna Ins. Co.*, 205 U. S. 489; *Carrol* v. *Greenwich Ins. Co.*, 199 U. S. 401; *Conn. Ins. Co.* v. *Spratley*, 172 U. S. 602; *Vorys* v. *Connell*, 67 O. S. 15.

The State has a right and a duty to regulate the business of insurance. *Allgeyer* v. *Louisiana*, 165 U. S. 578.

In order that the purchaser of a car may have the benefit of this insurance, it is necessary that there shall appear an intermediary in the person of the automobile salesman. In the sale of a car he represents that insurance is included. If the purchaser buys a car, it is through this salesman. If a purchaser obtains a certificate of insurance on the property, it is through the intervention of the same salesman. The intermediary between the purchaser and the Chrysler Corporation is the salesman. The intermediary between the purchaser and the insurance company is the salesman. It is impossible to disassociate the sale of the car from the sale of the insurance. When the dealer reports the sale of a car to the general agent of the insurance company, why is he not the agent of the insurance company in that transaction? He certainly is not the agent of the purchaser, because that operation is entirely unknown to the purchaser. The insurance never had effective existence until the sale at retail, by its very terms, or, as it may differently be stated, it is only to be made operative by an act of the retail dealer, and, the legal concept of insurance is that in the absence of special circumstances it does not attach to property but to persons. *Carpenter* v. *Providence Co.*, 16 Pet. 495; *Paul* v. *Virginia*, 8 Wall. 168; *N. Y. Ins. Co.* v. *Deer Lodge*, 231 U. S. 495. The sale of the car is the last act to be done to make the insurance contract effective. That act takes place in Ohio and up to that minute no insurance has been in force under a contract.

Under the provisions of § 9586, General Code of Ohio, the person performing that act becomes the agent of the insurance company which "thereafter" issues a certificate or policy, if you please, to the purchaser.

As to what constitutes doing business, see *Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407; *Laurentide Co.* v. *Durey*, 231 Fed. 228; *Traveling Men's Assn.* v. *Ruge*, 242 Fed. 766; *Beach* v. *Kerr Co.*, 243 Fed. 710; *Phillips Co.* v. *Everett*, 262 Fed. 344.

Mr. Raymond Fellows, Attorney General of Maine, with whom *Mr. J. F. Gould* was on the brief, for appellees in Nos. 273 and 274.

Mr. T. L. McIntosh, Assistant Attorney General of Wisconsin, with whom *Messrs. Herman L. Ekern*, Attorney General, and *Walter H. Bennett* were on the brief, for appellees in Nos. 286 and 287.

Mr. Justice Holmes delivered the opinion of the Court.

These cases all raise the same question. The first, *Palmetto Fire Insurance Company* v. *Conn*, is a suit to enjoin the Ohio Superintendent of Insurance from revoking the license of the plaintiff, a corporation of South Carolina, to do business in Ohio, on the ground that it has violated statutes of the latter State. These statutes forbid the insurance of property in the State except by a legally authorized agent, resident in Ohio, and tax the business lawfully done there. They provide also that any one who procures an application for insurance shall be held to be the agent of the party thereafter issuing the policy. The plaintiff says that if the statutes are held to apply to what it has done they are invalid under the Fourteenth Amendment of the Constitution of the United States. The case was tried before a statutory court of three judges and an injunction was refused. 9 Fed. (2d) 202.

The facts are simple. The plaintiff made a contract of insurance in Michigan with the Chrysler Sales Corporation, a Michigan corporation which sells all the automobiles made by the Chrysler Corporation. This contract purported to insure purchasers of Chrysler cars against fire and theft, and to become automatically effective from the date on which the purchaser took delivery or a bill of sale of the car; the Chrysler Company to send a monthly report to the plaintiff of all cars for which insurance was thus provided and to pay premiums accordingly at Detroit. If anyone bought a car he got the insurance whether he wished it or not as part of his bargain, and a certificate was sent to him by the plaintiff. The question is whether this transaction brought the plaintiff within the taxing power of Ohio. If it did not, the power of the State to exclude the Company altogether could not be used as a means to accomplish a result beyond the State's constitutional power. *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426.

Manifestly there was nothing in the contract between the plaintiff and the Chrysler Sales Corporation, without more, that Ohio could lay hold of, even if it insured property in Ohio. But the contract contemplated and provided for a benefit to third persons if, when, and where they complied with its conditions. When a man bought a car in Ohio, by that act he made effective the agreement of the Company to insure future purchasers, and imposed upon it an obligation that did not exist before. It is true that the obligation arose from a contract made under the law of another State, but the act was done in Ohio and the capacity to do it came from the law of Ohio, so that the coöperation of that law was necessary to the obligation imposed. It would be held in some jurisdictions that the purchaser became party to a contract with the insurance company. By universal consent he at least would become the beneficiary of a contract for his benefit.

Whatever technical form may be given to the reasoning, the substance is that by acts done in Ohio the purchaser obtains for himself the advantage of insurance that before that moment did not exist. It does not matter whether his getting it was a large or an inconspicuous feature of his bargain. It was part of it in any event, and we cannot doubt that the lower Court was right in holding that in such circumstances the State could insist upon its right to tax. It would be extravagant to say that the State's general power to deny to the plaintiff the right to enter or remain within it for business unless it paid for these transactions as a part of the price, must be denied upon constitutional grounds.

The two suits in Wisconsin, *Clark Motor Company* v. *Smith, Commissioner of Insurance,* and *Chrysler Sales Corporation* v. *Smith,* were begun about the same time as the Ohio case. The Clark Motor Company described itself as a distributor, buying cars from the Chrysler Sales Company and selling them to retail dealers, known as dealers. Neither distributor nor dealer acts as agent for the Chrysler Sales Company, but each buys and sells on its own behalf. The position of the Chrysler Sales Company, the other plaintiff, has been described. The Commissioner of Insurance treats the sales as contravening statutes of Wisconsin similar to those of Ohio. A Court of three judges refused an injunction against his enforcing the Acts. 9 Fed. (2d) 666. We are of opinion that the decision was correct. It is argued that the statutes were misconstrued by the Court. An appeal to this Court is allowed when an injunction is granted or refused on the ground of the alleged unconstitutionality of a State law. If we assume that other questions are open, still it is not desirable that the Courts of the United States should go beyond necessity to instruct the officials of a State as to the meaning of a State law. Unless the case is very clear their action should be left to the control of the State

Courts. There are plausible reasons in this case for following the local interpretation and we think that the Court below was right in accepting the Commissioner's view. Other arguments thrown in as makeweights do not need to be discussed. The fact that the cost of the insurance was taken up into the price of a machine otherwise lawfully sold does not prevent the insurance being reached. See *Herbert* v. *The Shanley Co.*, 242 U. S. 591. The question raised by these bills is the general one, whether the State laws can be applied to this insurance. That we have answered. Exactly how far the laws can go and what proceedings can or cannot be taken, may be left to be determined, if the questions arise, in the State Courts.

The cases from Maine, *Chrysler Sales Corporation* v. *Spencer, Insurance Commissioner,* and *Utterback-Gleason Company* v. *Spencer,* are like the last, and follow the Wisconsin decision after a full discussion. 9 Fed. (2d) 674. These decisions also must stand.

Decrees affirmed.

DORCHY *v.* KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 119. Argued October 7, 1926.—Decided October 25, 1926.

1. A decision by a state supreme court as to the separability of parts of a state statute from other parts found invalid by this Court, is binding on this Court. P. 308.
2. Upon review of a state court's judgment, facts not in the record and not noticed judicially, can not be considered. P. 311.
3. Mere reference, by the state supreme court, to another case as a controlling decision, did not incorporate the record of that case into the record of the one in which the reference was made. *Id.*
4. There is no constitutional right to call a strike solely for the purpose of coercing the employer to pay a disputed stale claim of a former employee, a member of the union. P. 311.

5. As applied to such a case, § 17 of the Kansas Industrial Relations Act, making it unlawful "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation" of mining, and § 19, making it a felony for an officer of a labor union wilfully to use the power or influence incident to his office to induce another person to violate § 17, are within the power of the State and do not deny the liberty guaranteed by the Fourteenth Amendment. P. 309.
6. Neither the common law nor the Fourteenth Amendment confers the absolute right to strike. P. 311.

116 Kan. 412, affirmed.

ERROR to a judgment of the Supreme Court of Kansas which affirmed sentence imposed on Dorchy under § 19 of the Kansas Industrial Relations Act, for using his influence as a labor union official to induce a strike, in violation of § 17. See S. C., 264 U. S. 286.

Mr. John F. McCarron, with whom *Messrs. Redmond S. Brennan* and *Phil H. Callery* were on the brief, for the plaintiff in error.

Messrs. John G. Egan and *Chester I. Long*, with whom *Messrs. Charles B. Griffith*, Attorney General of Kansas, *Austin M. Cowan*, and *William E. Stanley* were on the brief, for the State of Kansas.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 17 of the Court of Industrial Relations Act, Laws of Kansas, 1920, Special Session, c. 29, while reserving to the individual employee the right to quit his employment at any time, makes it unlawful to conspire "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of" mining. Section 19 makes it a felony for an officer of a labor union wilfully to use the power or influence incident to his office to induce another person to violate any provision of the Act.

Dorchy was prosecuted criminally for violating § 19. The jury found him guilty through inducing a violation of § 17; the trial court sentenced him to fine and imprisonment; and its judgment was affirmed by the Supreme Court of the State, *Kansas* v. *Howat,* 112 Kan. 235. Dorchy duly claimed in both state courts that § 19 as applied was void because it prohibits strikes; and that to do so is a denial of the liberty guaranteed by the Fourteenth Amendment. Because this claim was denied the case is here under § 237 of the Judicial Code as amended.

This is the second writ of error. When the case was first presented, it appeared that after entry of the judgment below certain provisions of the Act had been held invalid by this Court in *Charles Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522. The question suggested itself whether § 19 had not necessarily fallen, as a part of the system of so-called compulsory arbitration, so that there might be no occasion to consider the constitutional objection made specifically to it. That question, being one of statutory interpretation which had not been passed upon by the state court, the case was reversed without costs, and remanded for further proceedings not inconsistent with the opinion of this Court. *Dorchy* v. *Kansas,* 264 U. S. 286. Thereupon, the Supreme Court of Kansas decided that § 19 is so far severable from the general scheme of legislation held invalid that it may stand alone with the legal effect of an independent statute; and it reaffirmed the judgment of the trial court. *Kansas* v. *Howat,* 116 Kan. 412. By the construction thus given to the statute we are bound. The only question open upon this second writ of error is whether the statute as so construed and applied is constitutional.

The state court did not, in either of its opinions, mention the specific objection to the validity of § 19 now

urged. In the second, it discussed only the question of statutory construction. In the first, it stated merely that the case is controlled by *State* v. *Howat,* 109 Kan. 376; *Court of Industrial Relations* v. *Charles Wolff Packing Co.,* 109 Kan. 629, and *State* v. *Howat,* 109 Kan. 779. In these cases, which came to this Court for review in *Howat* v. *Kansas,* 258 U. S. 181 and *Charles Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522; 267 U. S. 552, there was no occasion to consider the precise claim now urged—the invalidity of § 19 when treated as an independent statute. Nor was this question referred to, in any way. But the claims made by Dorchy below properly raised it; and, as the judgment entered involves a denial of the claim, we must pass upon it. The question requiring decision is not, however, the broad one whether the legislature has power to prohibit strikes. It is whether the prohibition of § 19 is unconstitutional as here applied. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289. The special facts out of which the strike arose must, therefore, be considered.

Some years prior to February 3, 1921, the George H. Mackie Fuel Company had operated a coal mine in Kansas. Its employees were members of District No. 14, United Mine Workers of America. On that day, Howat, as president, and Dorchy, as vice-president of the union, purporting to act under direction of its executive board, called a strike. So far as appears, there was no trade dispute. There had been no controversy between the company and the union over wages, hours or conditions of labor; over discipline or the discharge of an employee; concerning the observance of rules; or over the employment of non-union labor. Nor was the strike ordered as a sympathetic one in aid of others engaged in any such controversy. The order was made and the strike was called to compel the company to pay a claim of one Mishmash for $180. The men were told this; and they

were instructed not to return to work until they should be duly advised that the claim had been paid. The strike order asserted that the claim had "been settled by the Joint Board of Miners and Operators but [that] the company refuses . . . to pay Brother Mishmash any part of the money that is due him." There was, however, no evidence that the claim had been submitted to arbitration, nor of any contract requiring that it should be. The claim was disputed. It had been pending nearly two years. So far as appears, Mishmash was not in the company's employ at the time of the strike order. The men went out in obedience to the strike order; and they did not return to work until after the claim was paid, pursuant to an order of the Court of Industrial Relations. While the men were out on strike this criminal proceeding was begun.

Besides these facts, which appear by the bill of exceptions, the State presents for our consideration further facts which appear by the record in *Howat* v. *Kansas*, 109 Kan. 376; 258 U. S. 181, one of the cases referred to by the Supreme Court of Kansas in its first opinion in the case at bar. These show that Dorchy called this strike in violation of an injunction issued by the State court; and that the particular controversy with Mishmash arose in this way. Under the contract between the company and the union, the rate of pay for employees under 19 was $3.65 a day and for those over 19 the rate was $5. Mishmash had been paid at the lower rate from August 31, 1917, to March 22, 1918, without protest. On that day he first demanded pay at the higher rate, and claimed back pay from August 31, 1917, at the higher rate. His contention was that he had been born August 31, 1898. The company paid him, currently, at the higher rate beginning April 1, 1918. It refused him the back pay, on the ground that he was in fact less than nineteen years old. One entry in the Mishmash family Bible gave

August 31, 1898, as the date of his birth, another August 31, 1899. Hence the dispute. These additional facts were not put in evidence in the case at bar. *Howat* v. *Kansas,* 109 Kan. 376, was a wholly independent proceeding. Mere reference to it by the court as a controlling decision did not incorporate its record into that of the case at bar. See *Pacific R. R. Co.* v. *Missouri Pacific Ry. Co.,* 111 U. S. 505, 517–8. And it does not appear that the court treated these facts as matters of which it took judicial notice. We must dispose of the case upon the facts set forth in the bill of exceptions.

The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare *Guaranty Trust Co.* v. *Green Cove R. R.,* 139 U. S. 137, 143; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109. To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. Compare *People* v. *Barondess,* 16 N. Y. Supp. 436; 133 N. Y. 649. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. Compare *Aikens* v. *Wisconsin,* 195 U. S. 194, 204–5.

Affirmed.

HEBERT ET AL. *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 24. Submitted October 13, 1926.—Decided November 1, 1926.

1. The Eighteenth Amendment contemplates that the manufacture of intoxicating liquor for beverage purposes may be denounced as a criminal offense by both federal and state law; and that these laws may not only coexist but be given full operation, each independently of the other. P. 314.
2. Where such manufacture is thus doubly denounced, one who engages therein commits two distinct offenses, one against the United States and one against the State, and may be subjected to prosecution and punishment in the federal courts for one and in the state courts for the other without any infraction of the constitutional rule against double jeopardy, it being limited to repeated prosecutions "for the same offense." P. 314.
3. The provision of § 256, Jud. Code, giving the District Courts exclusive jurisdiction of offenses, relates only to offenses under the federal law and does not affect the authority of a state court over an offense against the state law, although the same act was an offense against federal law as well. P. 314.
4. The power of a State to declare criminal the manufacture of intoxicating liquor for beverage purposes and to prosecute offenders, is not derived from the Eighteenth Amendment. P. 314.
5. In the absence of objection by the United States, persons under federal indictment and on bail awaiting trial for violations of the federal prohibition law, may be arrested and tried by the state courts for the same acts constituting violations of the state prohibition law. P. 315.
6. A decision of a state supreme court construing state penal statutes in such wise as to impose a heavier sentence than would be valid under the construction advanced by the accused is not reviewable here as a denial of due process of law, under the Fourteenth Amendment. P. 316.
7. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental

principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the land." Those principles are applicable alike in all the States and do not depend upon or vary with local legislation. P. 316.

158 La. 209, affirmed.

ERROR to a judgment of the Supreme Court of Louisiana affirming a sentence for violation of the state law against manufacture of intoxicating liquor for beverage purposes.

Messrs. A. R. Mitchell and *Thomas A. Edwards* for the plaintiff in error, submitted.

Messrs. Percy Saint, Attorney General of Louisiana, *Percy T. Ogden,* Assistant Attorney General, *John J. Robira,* and *E. R. Showalter* for the State of Louisiana, submitted.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

The State of Louisiana, like the United States, has a statute making it a criminal offense to manufacture intoxicating liquor for beverage purposes. A judgment of the Supreme Court of the State affirming a conviction under this statute, 158 La. 209, is presented for review by this writ of error. The writ was sued out before the Act of February 13, 1925, c. 229, 43 Stat. 936, and falls within the saving clause in the last section.

When the accusation was preferred in the state court, and when the accused were arrested thereon, they already were under indictment in the federal district court for the same acts as an offense against the federal statute and were on bail awaiting trial in that court. When taken before the state court they interposed a plea, first, that it was without authority to entertain the accusation, because the acts charged constituted an offense against the United States of which the federal district court was

given exclusive jurisdiction by § 256 of the federal judicial code, and, second, that, even if the accusation could be entertained, their arrest under state process while they were on bail awaiting trial in the federal district court was in derogation of the authority of the latter, and therefore did not give jurisdiction of their persons. The plea was overruled and this is assigned as error.

We think the ruling was right. The Eighteenth Amendment to the Constitution contemplates that the manufacture of intoxicating liquor for beverage purposes may be denounced as a criminal offense both by the federal law and by the state law; and that these laws may not only coexist but be given full operation, each independently of the other. Where such manufacture is thus doubly denounced, one who engages therein commits two distinct offenses, one against the United States and one against the State, and may be subjected to prosecution and punishment in the federal courts for one and in the state courts for the other without any infraction of the constitutional rule against double jeopardy, it being limited to repeated prosecutions "for the same offense." *United States* v. *Lanza,* 260 U. S. 377.

The provision in § 256 of the federal judicial code has no bearing on the authority of a state court to entertain an accusation for an offense against the state law. That provision relates to offenses "cognizable under the authority of the United States." Only offenses against the laws of the United States are cognizable under its authority. Those against state laws are cognizable only under the authority of the State. And this is true where the same act is an offense against both a law of the United States and a law of the State.

An argument is advanced to the effect that the State in denouncing the manufacture of intoxicating liquor for beverage purposes as a criminal offense and in taking proceedings to punish the offenders is exerting a power

derived from the Eighteenth Amendment, and therefore that all that is done by the State in that regard must be taken as done under the authority of the United States. The same argument was advanced in *United States* v. *Lanza, supra,* and was rejected as unsound for reasons which we deem it well to repeat here—

"To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. In effect, the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in *Vigliotti* v. *Pennsylvania,* 258 U. S. 403."

It, of course, was essential that the state court have jurisdiction of the persons of the accused. In fact they were before it and were accorded full opportunity to defend. In the absence of any showing to the contrary, and there is none, it properly may be assumed that the

United States acquiesced in their arrest and trial on the accusation under the state law, notwithstanding they were then on bail awaiting trial in the federal court on the indictment pending there. Certainly, if the United States was not objecting, the fact that the accused were thus on bail awaiting trial in the federal court presented no obstacle to the arrest under the process of the state court as a means of acquiring jurisdiction of their persons. *Ponzi* v. *Fessenden*, 258 U. S. 254, 260; *Beavers* v. *Haubert*, 198 U. S. 77, 85; *Peckham* v. *Henkel*, 216 U. S. 483, 486.

The accused also assign error on a ruling respecting the maximum period of imprisonment admissible under the state law. Two statutes were involved. The accused took the position that one was special and excluded the other. But the trial court rejected that view, construed the statutes as intended to be taken together, and as a result imposed a more burdensome sentence than was named in the statute which the accused thought controlling. The Supreme Court sustained that construction, and the accused contend here, as they did in that court, that the construction was wrong and, being wrong, operated as a denial of due process of law in the sense of the Fourteenth Amendment. The contention must be overruled. Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the

land." Those principles are applicable alike in all the States and do not depend upon or vary with local legislation. *Castillo* v. *McConnico,* 168 U. S. 674, 682-683; *West* v. *Louisiana,* 194 U. S. 258, 261-263; *Patterson* v. *Colorado,* 205 U. S. 454, 459; *Pullman Co.* v. *Knott,* 235 U. S. 23, 25; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 166. The Supreme Court of the State having held that the two statutes must be taken together in determining the penalty intended we must accept that conclusion as if written into the statutes themselves. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 73. All that would be open in this Court under the due process clause is whether the State had power to impose the penalty fixed by the statutes as thus construed. *Rawlins* v. *Georgia,* 201 U. S. 638, 640. That the State had such power is not questioned, but only that the statutes rightly construed show that the power has been exercised. On this question, as we have said, the decision of the Supreme Court of the State is controlling.

Judgment affirmed.

MOORE, COMMISSIONER, v. FIDELITY & DEPOSIT COMPANY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 185. Argued October 12, 1926.—Decided November 1, 1926.

1. Under Jud. Code § 238, as amended by Act of Feb. 13, 1925, a decree of the District Court is not appealable directly to this Court on constitutional grounds alone, but only in cases falling within the acts or parts of acts enumerated in that section as amended. P. 319.
2. Section 266, which is enumerated in and amended by § 238, authorizes a direct appeal to this Court from the final decree of the District Court granting a permanent injunction in a suit to

restrain enforcement of an order of a state administrative board upon the ground of unconstitutionality, only where the case was, and was required to be, heard before three judges because the application for a preliminary injunction was pressed. P. 320.

Appeal from 3 F. (2d) 652, dismissed.

APPEAL from a final decree of the District Court (one judge sitting) granting a permanent injunction in a suit by indemnity insurance companies to enjoin a state insurance commissioner from carrying out a threat to annul their licenses for failure to obey an order cancelling their authority to issue a certain kind of policy. The prayer for a preliminary injunction was not pressed.

Miss Grace E. Smith, Assistant Attorney General of Oregon, with whom *Messrs. I. H. Van Winkle,* Attorney General, and *Willis S. Moore,* Assistant Attorney General, were on the brief, for the appellant.

Mr. John S. Coke, with whom *Mr. Franklin T. Griffith* was on the brief, for the appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Three companies licensed to do business in Oregon brought this suit against its insurance commissioner in the federal court for that State. The bill alleges that a former commissioner had authorized these companies to issue indemnity bonds, commonly called "Confiscation Coverage," by which those who sell automobiles on conditional sale are insured against loss arising from their confiscation for violation of law; that the defendant has entered an order cancelling this authorization, on the ground that insurance of this nature is void as against public policy because it serves to encourage the transportation of intoxicating liquors in violation of law; and that he has threatened to annul the plaintiffs' licenses, unless they refrain entirely from writing such indemnity

bonds. The bill charges that the defendant's action is in excess of the powers conferred upon him by the statutes of the State; and that his wrongful acts will, unless restrained, deprive plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. The bill prays for both a preliminary and a permanent injunction.

The defendant moved to dismiss the bill, on the ground that it did not state facts sufficient to constitute a cause of action. The motion was overruled. An answer was filed. Parts of it were stricken out on plaintiff's motion. What remained admitted substantially all the allegations of the bill. The case was then heard further by a single judge, who on May 18, 1925, entered a final decree for an injunction. The constitutional question presented by the bill was not passed upon. The decision was rested solely upon the ground that the order complained of was in excess of the powers conferred by the statutes upon the insurance commissioner. 3 F. (2d) 652. An appeal to this Court was allowed by the District Judge. A motion having been made to advance the case for argument, this Court, of its own motion, entered a rule that the appellant show cause why the appeal should not be dismissed for lack of jurisdiction in this Court. Upon return to the rule, the case was set for argument.

The bill invoked the jurisdiction of the federal court on the ground of diversity of citizenship as well as on the ground that plaintiffs' constitutional rights were threatened. Although the constitutional question raised was not passed upon by the District Court, the allegations of the bill would have supplied the basis for a direct appeal under § 238 of the Judicial Code before that section was amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938. Compare *Winchester* v. *Winchester Water Works,* 251 U. S. 192, 193. But § 238 was so far changed by that Act, that now there is no right to a

direct appeal on constitutional grounds alone; the right exists now only in cases falling within the provisions enumerated in that section as amended. Otherwise the case must go in the first instance to the Circuit Court of Appeals and may come here only for review of that court's action. See *Application of Buder*, 271 U. S. 461.

The Act of 1925 applies, as the decree of which review is sought was entered after May 13, 1925. Among the provisions enumerated in § 238 as amended, is § 266 of the Judicial Code. It is contended that this case falls within the latter section. It was amended by the addition of the following provision: "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." Appellant contends that this appeal lies under § 266, because the order of the insurance commissioner is an order of an administrative board; and the suit is one which seeks relief by way of "interlocutory injunction suspending or restraining . . . the enforcement . . . of an order made by an administrative board . . . acting under and pursuant to the statutes of such State . . . upon the ground of unconstitutionality . . ."

In the case at bar there was an attack upon the order of the insurance commissioner "upon the ground of unconstitutionality" within the meaning of § 266. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 292. It may be assumed that the order was action of an administrative board within the meaning of that section. Compare *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426. But the prayer for a preliminary injunction was not pressed; nor was there any request that the case be heard by a court consisting of three judges, which would have been necessary under § 266 if the prayer had been pressed. That section as originally enacted applied only where interlocutory relief was actually sought, regardless of the

scope of the bill. Its purpose was to minimize, in an important class of cases, the delay incident to a review of a decree granting or denying an interlocutory injunction. The general purpose of the Act of 1925 was to relieve this Court by limiting further the absolute right to a review by it. There is nothing in the provision added by that Act to § 266 which indicates a purpose to extend the application of that section—either as to the requirement of three judges or as to the right to a direct appeal—to a case in which an interlocutory injunction was not actually applied for. The occasion for the provision was considered in the *Buder* case. It authorizes a direct appeal to this Court from the final decree of the district court only where an application was made for an interlocutory injunction and the case was heard before three judges.

Dismissed.

UNITED STATES *v.* ONE FORD COUPE AUTOMOBILE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 115. Argued December 9, 1925; reargued October 19, 20, 1926.—Decided November 22, 1926.

1. Where property declared by a federal statute to be forfeited because used in violation of federal law is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized. P. 325.
2. An automobile, seized while being used for the purpose of depositing or concealing tax-unpaid illicit liquors with intent to defraud the United States of the taxes imposed thereon, is forfeitable under Rev. Stats. § 3450, and the interests of innocent persons in the vehicle are thereby divested. P. 325.
3. Intoxicating liquor, though made for beverage purposes in violation of the National Prohibition Act, is subject to tax. Supplementary Prohibition Act of Nov. 23, 1921, considered, and Revenue Act of 1921. P. 326.

4. The basic tax of $2.20 per gallon imposed by the Revenue Acts on liquor illegally produced is not to be treated as a penalty, but is a tax within the meaning of Rev. Stats. § 3450, and being unpaid makes that section applicable, even if the additional amounts imposed by the Acts were deemed penalties. P. 328.
5. There is no constitutional objection to enforcing a penalty by forfeiture of an offending article. P. 329.
6. In a forfeiture proceeding, on certiorari to a judgment quashing the libel on motion of a claimant, the allegations in the claim will not be considered. The allegations of the libel are accepted as true. P. 329.
7. Under Rev. Stats. § 3450, if the intent to defraud the United States of the tax is established by any competent evidence, a use of the vehicle for the purpose of concealing the liquor suffices, even if the offender obtained it, not from a distillery, bonded warehouse or importer, but from a stranger. P. 329.
8. Rev. Stats. § 3450, providing that: "Whenever any goods . . . in respect whereof any tax is or shall be imposed . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax . . .; [every] . . . conveyance whatsoever, . . . used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited," is not in conflict with or superseded by § 26 of Title II of the National Prohibition Act, which provides for the seizure and forfeiture, in certain cases, of vehicles used in illegally transporting intoxicating liquors but saves the interests of innocent persons. P. 330.
9. In view of § 5 of the Supplemental Prohibition Act, an implied repeal by that Act or the National Prohibition Act, of Rev. Stats. § 3450, could not result from mere inconsistency but must rest upon a direct conflict. P. 331.
10. Section 26, Title II, of the National Prohibition Act, in its relation to the forfeiture of vehicles, applies only to cases incident to the prosecution of persons transporting liquor in violation of that Act, and does not protect innocent persons whose vehicles are forfeited under Rev. Stats. § 3450. P. 332.
11. Section 26, *supra*, applies only where a person is discovered in the act of transporting intoxicating liquor in violation of law. P. 333.

4 F. (2d) 528, reversed.

LIBEL to forfeit an automobile under Rev. Stats. § 3450, on the ground of use with intent to defraud the United

States of the tax on distilled spirits found therein, by depositing and concealing the liquor. The Garth Motor Company intervened as claimant. A judgment of the District Court quashing the libel was affirmed by the Circuit Court of Appeals. Certiorari was granted, 268 U. S. 687.

Assistant Attorney General Willebrandt, for the United States, on the original argument, *Solicitor General Mitchell* for the United States on the reargument. *Mr. Mahlon D. Kiefer,* Special Assistant to the Attorney General, was also on the briefs.

Mr. Duane R. Dills, with whom *Messrs. William S. Pritchard, John W. Creekmur, Phillip W. Haberman,* and *Frank H. Towsley* were on the brief, for the claimant.

Mr. Justice Brandeis delivered the opinion of the Court.

This is a proceeding, commenced in the federal court for Northern Alabama, under Revised Statutes of the United States, § 3450, to forfeit an automobile "said to belong to Garth Motor Company," on the ground that it was being used with intent to defraud the United States of the tax on distilled spirits found therein by depositing and concealing the liquor.[1] The libel, which was filed in September, 1923, recites that it is "a case of seizure on land under the internal revenue laws of the United States." The company intervened as claimant and moved to quash the libel. It also filed a claim by which it asserted title to the automobile and denied

[1] "Whenever any goods . . . in respect whereof any tax is or shall be imposed . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax . . ; [every] . . . conveyance whatsoever, . . . used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. . . ."

knowledge or notice, prior to seizure, that the automobile was being used or was to be used in any illegal manner. No action was ever taken on the claim. The motion to quash was allowed; and upon that motion alone the District Court entered judgment dismissing the libel. The judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 4 F. (2d) 528. The case is here on writ of certiorari, 268 U. S. 687.

The libel alleges that on August 11, 1923, the federal prohibition director for Alabama had seized the automobile in the possession of one Killian being used by him "for the purpose of depositing and concealing certain illicit distilled spirits" on which "the taxes imposed by law had not been paid" with "intent . . . to defraud the United States of such taxes"; alleges that the automobile is forfeit under § 3450; and prays relief thereunder. To the libel is attached, and made part thereof, a complaint, dated August 13, 1923, by a federal prohibition agent. In that complaint, the affiant charged, with specification, only that Killian unlawfully had there in his possession 27 quarts of rye whisky, in violation of § 29 of Title II of the National Prohibition Act, October 28, 1919, c. 85, 41 Stat. 305, 316; and he prayed that Killian "may be apprehended and further dealt with according to law." The complaint made no reference to removal or transportation of liquor; nor to the use of a vehicle for such purpose; nor to any seizure; nor to § 26 of the Prohibition Act. It did not even mention an automobile or other vehicle. Nor did the libel state that a warrant issued on the complaint; or that Killian had been arrested or in any way prosecuted for any alleged violation of the Prohibition Act; or that his whereabouts was known.

The sole question for decision is, whether an automobile, which was seized by a prohibition agent, may be forfeited under § 3450 if it was being used for the purpose

of depositing or concealing tax-unpaid illicit liquors with the intent to defraud the United States of the taxes imposed thereon. Obviously, the mere fact that the seizure of the automobile had been made by the prohibition director (instead of by an internal revenue officer) does not preclude the possibility of a proceeding to forfeit under § 3450. It is settled that where property declared by a federal statute to be forfeited because used in violation of federal law is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized. *The Caledonian,* 4 Wheat. 100, 101; *Taylor* v. *United States,* 3 How. 197, 205. See *United States* v. *One Studebaker Seven-Passenger Sedan,* 4 F. (2d) 534.

The serious question presented is whether there is such a direct conflict between the National Prohibition Act, and particularly § 26 of Title II thereof, and § 3450 of the Revised Statutes, as to render the latter section inoperative and unavailable to the Government, where the vehicle was being used for the purpose of depositing and concealing illicitly distilled liquors under the circumstances set forth in the libel. On this question there has been much difference of opinion in the lower courts.[2] If a forfeiture may be had under § 3450 for such use of a vehicle to evade a tax on illicitly distilled liquor, the interests of innocent persons in the vehicle are not saved. If § 26 is the only applicable provision for forfeiture of the car, the interests of those who are innocent are not forfeited. The claimant contends, on several grounds,

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[2] See *Commercial Credit Co.* v. *United States,* 5 F. (2d) 1, and cases there cited. Also *United States* v. *Milestone,* 6 F. (2d) 481; *United States* v. *One Reo Truck Automobile,* 9 F. (2d) 529; *National Bond & Investment Co.* v. *United States,* 8 F. (2d) 942; *United States* v. *One Marmon Automobile,* 5 F. (2d) 113; *United States* v. *One Ford Automobile,* (U. S. D. C., E. & W. D., Tenn.) Feb. 27, 1925.

that § 3450 was not applicable and that the libel was properly dismissed.

First. The claimant contends that, at the time of the seizure, the law did not impose any tax upon liquor illicitly made. Congress has power to tax such liquor. *United States* v. *Yuginovich,* 256 U. S. 450, 462; *United States* v. *Stafoff,* 260 U. S. 477, 480. By Rev. Stats. § 3248, the tax attaches to distilled spirits "as soon as it is in existence as such," *United States Fidelity & Guaranty Co.* v. *United States,* 220 Fed. 592; and upon its production the tax becomes a first lien thereon. *United States* v. *Ulrici,* 111 U. S. 38, 42. The Revenue Act of 1918, February 24, 1919, c. 18, § 600, 40 Stat. 1057, 1105, lays the tax "on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States." The provision in § 600b of the Act, concerning liquor which could not during the period of war-prohibition be lawfully sold or removed, did not remit the tax; it merely deferred the time for payment. It is clear that, before the enactment of the National Prohibition Act, it imposed the basic production tax upon all distilled spirits, although illicitly made.[3]

The continued existence of taxes upon illicit liquor is indicated in § 35 of the National Prohibition Act (p. 317), which provides: "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." That Congress in enacting that law would intentionally have exempted illicit liquor from taxation is not likely. Moreover, we are not dealing with the construction of the law as enacted in 1919. The Willis-Campbell Act, November 23, 1921, c. 134, § 5, 42 Stat. 222, 223, sup-

[3] See also Rev. Stat. § 3251; Acts of March 3, 1875, c. 127 § 1, 18 Stat. 339; August 27, 1894, c. 348, § 48, 28 Stat. 509, 563; October 3, 1917, c. 63, § 300, 40 Stat. 300, 308.

plemental thereto, continued in force or reënacted, by express provision, all laws in regard to the taxation of intoxicating liquor not directly in conflict with the prohibitory legislation. Furthermore, the Revenue Act of 1921, November 23, 1921, c. 136, § 600, 42 Stat. 227, 285, enacted on the same day, shows that Congress had no intention then of relieving liquor from taxation merely because illegally dealt with. For it provided specifically that if distilled spirits, tax-paid for non-beverage purposes, be diverted to beverage purposes, an additional tax of $4.20 per gallon must be paid, although under the law such diversion could not be made legally.

The claimant argues that it could not have been the intention of Congress to impose the tax, because it had become very difficult, if not impossible, to pay the tax. The claimant points to the fact that the payment of the tax contemplated by the revenue laws existing at the time of the passage of the National Prohibition Act was by means of tax-paid stamps to be affixed when liquor was withdrawn from the distillery or bonded warehouse, after complying with the minutely prescribed proceedings incident to its manufacture and custody, set forth in *Taney* v. *Penn Bank*, 232 U. S. 174, 181–184; that, since the National Prohibition Act, there has been no way in which the tax could be so paid on intoxicating liquor made for beverage purposes; that stamps are no longer obtainable and no officer is authorized to receive payment. These supervening obstacles to paying the tax do not, however, establish that the intention was not to continue it in force. A law which imposes a tax on intoxicating liquor, whether legally or illegally made, is not in conflict with another law which prohibits the making of any such liquor. Compare *United States* v. *Stafoff*, 260 U. S. 477; *Vigliotti* v. *Pennsylvania*, 258 U. S. 403. There is no direct conflict between any provision of the prohibitory legislation and the imposition of the tax here in question.

Second. The claimant contends that the so-called tax on illicitly distilled spirits theretofore imposed ceased to be a tax and became in law a penalty, when the enactment of the National Prohibition Act changed the purpose of the tax from raising revenue to preventing manufacture, sale, and transportation; and that to enforce such penalty by forfeiture of the property rights of innocent third parties would be a denial of due process of law. It is true that the use of the word "tax" in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such. But the imposition here in question is not of that character. A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable. What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer,* 259 U. S. 557, 561, was the so-called double tax. Here, we are dealing with the basic production tax.

With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. It is a tax within the meaning of § 3450; and being unpaid makes that

section applicable, even if the additional amounts imposed by the Acts be deemed penalties. Moreover, there is no constitutional objection to enforcing a penalty by forfeiture of an offending article. *Lipke* v. *Lederer* holds merely that the enforcement of a penalty by an administrative official without giving notice and an opportunity to defend is a denial of due process. A proceeding under § 3450 is a judicial proceeding in which the claimant is accorded fully the right to litigate. A claim was filed in this case; but that is not now before us. Instead of asking for a hearing thereon, the claimant chose to move to quash the libel. If the judgment dismissing the libel is set aside, a hearing on the merits of the libel and of the claim may still be had. But we may not consider now allegations in the claim.

Third. The claimant contends that a proceeding under § 3450 will not lie to forfeit a vehicle, unless it was being used to remove the tax-unpaid article from the place where the tax was required by law to be paid, that is, the place of manufacture or of importation, or a bonded warehouse. This narrow meaning of the word "remove" is urged upon us, as contrasted with the broad term "transport" employed in § 26. We have no occasion to determine the exact scope, in this connection, of the term "remove." The libel makes no reference to removal. It charges only that the automobile was being used to deposit or conceal.

Under § 3450, it is not essential that the offender must have been either the manufacturer or importer of the liquor or a person directly associated with him. The Government may look for payment also to the liquor itself and to whoever has possession of it. Nor does the language of § 3450, or its history, indicate that Congress intended to limit the proceeding under that section to cases where the vehicle was used for deposit or concealment as part of the illegal act of removal, or to make it

applicable only where the article concealed had been unlawfully removed from the place where the tax should have been paid. If the intent to defraud the United States of the tax is established by any competent evidence, a use of the vehicle for the purpose of concealment satisfies the requirement of § 3450, even if it appears that the offender obtained it, not from a distillery, bonded warehouse or importer, but from a stranger.

It is argued that Killian's purpose cannot have been to evade the tax; that it was only to violate the Prohibition Act. The place from which the removal is made, and the special relation to the manufacturer or importer of him who used the vehicle, are of evidential significance only. Knowledge that liquor was illicitly distilled may tend to prove knowledge that it was tax-unpaid. Removal or concealment of the liquor with such knowledge may tend to prove an intention to deprive the United States of the tax due thereon. But with these questions we have no concern now. The case is here on review of a judgment of dismissal upon a motion to quash. Therefore we must accept as true the allegations of the libel.

Fourth. The claimant contends that § 3450, in so far as it applied to intoxicating liquor, was superseded by § 26 of the National Prohibition Act. There was no repeal in terms. There cannot be held to have been a repeal by implication, unless § 3450 is in direct conflict with some provision of the National Prohibition Act or of the supplemental act. For Congress has declared in § 5 of the Willis-Campbell Act that, in ascertaining its intention in this connection the standard of mere inconsistency, which had been applied in *United States* v. *Yuginovich*, 256 U. S. 450, shall not prevail.

The two statutes cover different ground. Different purposes underlay their enactment. Section 3450, extending to every taxed article, seeks to enforce the obli-

gation to pay the tax by subjecting to forfeiture also articles used in the attempt to evade such payment. The purpose of § 26 is to prevent the manufacture, sale or transportation of intoxicating liquor. *Carroll* v. *United States,* 267 U. S. 132, 154–155, 157. It is true that many acts punishable under § 3450 are punishable also under § 26. But many are not. Thus § 3450 applies to a vehicle, whether used for removal, deposit, or concealment, and even although the vehicle is not in motion and movement was never contemplated; § 26 applies only to a vehicle used in transporting contrary to law. Section 3450 may apply although a permit was obtained to transport the liquor; § 26 cannot. On the other hand § 3450, as applied to liquor, relates only to that on which taxes have not been paid; § 26 applies whether taxes have been paid or not. It is clear that the mere existence of two provisions penalizing acts which are part of the same transaction does not prove direct conflict between them. Nor does the difference in purpose which underlay their enactment.

In the absence of conflict resulting from differences in the scope and purposes of the statutes, the claim of implied repeal must rest upon essential conflict incident to the prescribed methods of their operation. None such has been shown. Direct conflict is not established by showing merely differences in details of procedure. That some other mode of disposition must now take the place of the requirement in § 3450 for the sale of the seized liquor is not sufficient to establish a conflict of the provisions as applied to a seized vehicle. To establish an implied repeal there must, under the legislative mandate, be shown some necessary contradiction so extreme as to justify this Court in finding it impossible to permit the Government the choice between the two remedies where the facts bring the offense within the provisions of both statutes. Such a contradiction is said to exist, because

under § 3450 the vehicle is the offender and must be forfeited if there is a guilty intent on the part of him who used it, whereas under § 26 a person is the offender and the forfeiture of the vehicle extends only to the interests of those who share in his guilt by having notice that it was to be used for the illegal purpose; that under § 3450 the vehicle may be forfeited although no person is convicted of the offense involved or is even prosecuted, whereas under § 26 there can be no forfeiture unless there has been a conviction of one discovered in the act of transportation in violation of law. But it is not true that these differences show direct conflict. The provisions for forfeiture of the vehicle and for arrest of the transporter are both incidental to the main purpose of § 26 of reaching and destroying the forbidden liquor in process of transportation. *Carroll* v. *United States*, 267 U. S. 132, 155. The contradiction urged relates only to the nature of the incidental penalty and the effect of its imposition. It is clearly possible to apply to a particular state of facts either one or the other remedy, and to give to the Government the choice. To hold that where the tax-unpaid spirits were illegally distilled, there could be forfeiture of the vehicle only under § 26 while in case of tax-unpaid legally distilled liquor the vehicle could be forfeited under § 3450, would involve holding that where the crime of tax-evasion is preceded by the offense of illegal distillation, a less severe forfeiture is inflicted than if tax evasion alone were involved.

Fifth. The claimant contends that § 26 has modified § 3450, as applied to intoxicating liquors, so as to deny a forfeiture of the interest in the vehicle of one who had no guilty knowledge that it was to be used for an illegal purpose. That there was no such protection of the innocent interest prior to the National Prohibition Act is conceded. *Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505. That since the Willis-Campbell Act, Congress

has not intended to restrict any remedy theretofore given in aid of the revenue laws is clear. The argument that by § 26 Congress manifested the intention to protect generally innocent interests is unfounded. The section is narrow in scope. The protection accorded is stated explicitly. It does not apply generally to violations of the Prohibition Act, nor to the violation of any provision of the revenue laws. It applies solely to cases of forfeiture incident to the prosecution, as therein provided, of a person transporting liquor by a vehicle in violation of the Prohibition Act.

The suggestion is made that in this view of § 3450 there may be a forfeiture where a stranger has surreptitiously deposited or concealed the liquor in the vehicle while in the possession and use of the owner, or has obtained possession of the vehicle by theft and then made such use of it. But we are not here concerned with such a state of facts and therefore may dismiss the suggestion by repeating what was said of like possibilities pressed on our attention in the *Goldsmith, Jr.-Grant Company* case (p. 512): "Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it. And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent."

Sixth. The claimant contends that, as applied to intoxicating liquors, § 3450 and § 26 are alternative remedies; and may not be employed cumulatively. Section 26 commands that, when a person is discovered in the act of transporting, by means of a vehicle, intoxicating liquors in violation of the law, the officer shall take possession of the vehicle, and shall arrest the person in charge thereof; that the person shall be proceeded against for

the violation; that, pending the proceeding against him, the vehicle shall be surrendered to the owner upon giving bond to return it to the custody of the officer on the day of the trial to abide the judgment of the court; that, in case of conviction of the person, the vehicle shall be sold under conditions and in a manner prescribed; that the proceeds remaining after paying the expenses shall be paid over to the lienors innocent of wrong-doing; and that, unless and except so far as there are such lienors or others entitled thereto, the net proceeds shall be paid into the Treasury of the United States. The claimant insists not only that the Government must elect between § 26 and § 3450, but that the commencement of proceedings under § 26 bars a resort to § 3450.

The case at bar does not present any conceivable question of cumulative remedies or of election. While the second sentence in § 26 uses the words "transported or possessed," the context makes it very plain that the possession intended is possession in transportation.[4] Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used. There is no allegation that Killian, who had possession of the automobile, has ever been prosecuted. It appears that a complaint was made but not that a warrant was issued; or that he was arrested; or even that he was found. The

[4] The words of the section are: "Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the *act of transporting* in violation of the law, intoxicating liquors *in any wagon, buggy, automobile, water or air craft, or other vehicle,* it shall be his duty to seize any and all intoxicating liquors found therein *being transported* contrary to law. Whenever intoxicating liquors *transported or possessed* illegally shall be seized by an officer he shall *take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance,* and shall arrest any person *in charge thereof. . . .*" (Italics ours.)

motion to quash must be determined on the showing in the libel.

Reversed.

MR. JUSTICE STONE, concurring.

I agree that the Willis-Campbell Act requires § 3450 of the Revised Statutes and § 26 of the National Prohibition law to be so construed as to stand together in so far as they are not in direct conflict. I agree also that there conceivably may be a deposit or concealment of illicit liquor in an automobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of § 26 and to that extent the two sections are not in conflict. But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict, in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition law with intent to defraud the United States of the tax. In that case § 26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section. In that event § 26 saves the interest of the innocent owner or lienor from the forfeiture required by § 3450. It appears to me that the conflict in such a case is direct and that § 26 by its terms is controlling.

MR. JUSTICE BUTLER, dissenting.

1. No tax, as distinguished from penalty, is imposed on the manufacture, sale or transportation of intoxicating liquor for beverage purposes.

The Eighteenth Amendment by its own force invalidated all laws which in any manner sanctioned the manufacture, sale or transportation of such liquor. *National Prohibition Cases,* 253 U. S. 350, 386. And it empowered Congress to pass appropriate legislation to enforce the prohibition. The manufacturer of intoxicating liquor

for medicinal or other non-beverage purposes may be authorized or encouraged; but an attempt so to deal with liquor for beverage purposes would be a plain violation of the Amendment.

If Congress has any power to impose a tax, as distinguished from a penalty, on the production of beverage liquor forbidden by the Constitution, its purpose so to do must be disclosed unmistakably by language that is not susceptible of any other meaning. All exactions now imposed on such manufacture should be held to be penalties to enforce prohibition. The question whether the exactions called taxes were in fact penalties was not involved in *United States* v. *Yuginovich*, 256 U. S. 450 462, or in *United States* v. *Stafoff*, 260 U. S. 477. When reading and applying the legislation here in question, it should be borne in mind that it is the duty of Congress to impose penalties to enforce the prohibition of beverage liquor, and that Congress has undertaken vigorously to discharge that duty.

The libel for condemnation of the automobile does not refer to the statute under which the so-called tax is claimed, and does not state the amount demanded. But the Government relies on § 600(a) of the Revenue Act of 1918, approved February 24, 1919, c. 18, 40 Stat. 1057, 1105. This provision was enacted before the War Prohibition Act, the Eighteenth Amendment and the National Prohibition Act took effect. The language is:

"That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, . . . in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if *withdrawn* for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, . . . to be paid by the distiller or importer *when withdrawn*, and collected under the provisions of existing law."

And, after National Prohibition became effective, that provision was amended by § 600 of the Revenue Act of 1921, c. 121, 42 Stat. 227, 285, which added:

"Provided, That on all distilled spirits on which tax is paid at the *nonbeverage rate of $2.20* per proof gallon and which are *diverted* to beverage purposes . . . there shall be levied and collected *an additional tax of $4.20* on each proof gallon, . . . to be paid by the person responsible for such diversion."

The Government contends that, within the meaning of § 3450, $2.20 per gallon is a true tax on all liquor whether legally or illegally distilled. And, as to the imposition made by § 600 of the Act of 1921, it rightly says that the so-called *additional tax* of $4.20 on each proof gallon *diverted* to beverage purposes is a penalty. Clearly, it is an imposition by way of punishment to enforce prohibition.

The $6.40 exaction per gallon specified in § 600(a) of the Act of 1918 cannot be claimed as the liquor was not "withdrawn" for beverage, or at all. That exaction was imposed before National Prohibition. It applied to all distilled spirits then in bond, or that had been or thereafter might be, produced or imported into the United States—with exceptions not here material. But when the Eighteenth Amendment and the National Prohibition Act became effective, the production of beverage liquor was prohibited. Intoxicating liquors cannot be "withdrawn for beverage purposes." The whole charge of $6.40 per gallon was held to be a penalty and not a tax in *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, 389, 392.

But it is said that the continued existence of taxes, as distinguished from penalties, on liquor for beverage purposes is indicated by § 35 of the National Prohibition Act. The meaning of the sentence on which the majority relies will be more clear when other provisions there found are called to attention. The section pro-

vides: "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the *manufacture or traffic* in intoxicating liquor shall be construed as in addition to existing laws." Manifestly, these "regulations" apply only to nonbeverage liquor because the manufacture, sale or transportation of beverage liquor is forbidden by the Constitution. The section proceeds: "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." This is the sentence relied on. That the "taxes" there mentioned relate to nonbeverage liquor is apparent from the sentence immediately following. "No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a *tax* shall be assessed against, and collected from, the *person responsible* for such illegal manufacture or sale in double the amount now provided by law [meaning that imposed on liquor lawfully made] with an *additional penalty* of $500 on retail dealers and $1,000 on manufacturers. The payment of such *tax* or *penalty* shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws." As to nonbeverage liquor legally made, the tax is upon *production*. That is the only "tax." The further exaction is a special imposition to enforce prohibition. As to beverage liquor, the so-called *double tax* together with the *additional penalty* of $500 or $1,000, as the case may be, is upon the *person responsible*. It is a punishment by penalty in a sum equal to double the tax plus the specified "additional penalties." The amount cannot be paid as a tax. The liability attaches only on commission of crime—"illegal manufacture or sale."

In *Lipke* v. *Lederer,* 259 U. S. 557, it was held that these exactions are penalties. The Court said (561–562): "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax Case, ante,* 20. When by its very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States,* 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government,' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix,* 233 U. S. 318, 324."

Again, after the effective date of the Eighteenth Amendment, a collector of internal revenue levied under § 600(a) of the Revenue Act of 1918 a "so-called assessment or tax at the rate of $6.40 per gallon" on distilled liquors withdrawn from bonded warehouses between October, 1918 and June, 1920. This court reiterated what it had said in *Lipke* v. *Lederer,* and held that the sums so imposed were penalties, not taxes. *Regal Drug Co.* v. *Wardell, supra,* 389, 392. The exaction of $6.40 per gallon there claimed included the $2.20 per gallon for which the automobile in this case is held subject to confiscation.

Section 5 of the Willis-Campbell Act of November 23, 1921, c. 134, 42 Stat. 222, 223, is also relied on. The purpose of that section is clear when regard is had to the scope of the Act of which it is a part. That is "An Act Supplemental to the National Prohibition Act." It was passed to aid enforcement of prohibition and not to raise revenue. It authorizes and purports to regulate the prescribing of liquors for medicinal purposes; prohibits importation and manufacture until the supply then in dis-

tilleries and other bonded warehouses shall be reduced to an amount not sufficient for nonbeverage purposes; permits spirits produced in this country and exported to be returned for redeposit in bonded warehouses from which originally taken; extends the National Prohibition Act to all the territory of the United States, and makes all violators liable to the penalties provided for in the original Act.

The words upon which the majority relies are these: "That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in § 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor." Then follows a provision exempting from taxation spirits lost by theft from distilleries or other bonded warehouses without negligence or collusion, and the Act provides punishment for certain misconduct of government enforcement officers and others.

That Act does not make a "tax" out of what was, before its passage, a "penalty." It does not change the classification of exactions declared in *Lipke* v. *Lederer* and *Regal Drug Co.* v. *Wardell.* The Constitution forbids, and the National Prohibition Act denounces as crime, the manufacture, sale and transportation of intoxicating liquor for beverage purposes. The exactions in respect

of such liquor were properly to be considered to enforce prohibition and to punish violations of law. The Willis-Campbell Act expressly saved all measures for enforcement. The exaction still depends on the commission of crime. The Government's argument that the total charge of $6.40 per gallon is to be divided, so that $4.20 of that amount may be regarded as penalty aimed at beverage liquor and $2.20 as a tax imposed on all liquor, is without support in the language used, and is contrary to the decisions of this court. It was beverage liquor that Killian had in the automobile. The nonbeverage rate does not apply.

2. There is direct conflict between § 26 and § 3450 in respect of the disposition of vehicles seized. The facts disclosed by the record bring the case under § 26.

Section 3450 relates to all *goods and commodities* on which *taxes* are imposed. And it provides that whenever any such things "are removed, or are deposited or concealed in any place, *with intent to defraud the United States of such tax* . . . all such goods and commodities . . . shall be forfeited; and in every such case . . . every . . . carriage or other conveyance whatsoever . . . and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

Section 26 of the National Prohibition Act lays down the course to be followed by the enforcing officers. They are given no discretion. It provides: "When the commissioner, his assistants, inspectors, or any officer of the law, shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any . . . automobile . . . or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle . . . and shall arrest any person in charge

thereof. Such officer shall *at once* proceed against the person arrested *under the provisions of this title* . . . but the said vehicle . . . shall be returned to the owner" upon giving a bond conditioned to return the vehicle to the officer on the day of the trial to abide the judgment of the court. Upon conviction of the person arrested the court is required to order the liquor destroyed, "and unless good cause to the contrary is shown by the owner, shall order a sale by public auction" of the vehicle, and the officer making the sale, after deducting expenses, the fee for seizure and costs of sale shall pay all liens according to their priorities which are established at the hearing "as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury. . . ." All liens are transferred from the property to the proceeds. If no one shall be found claiming the vehicle notice by publication is required. "And if no claimant shall appear within ten days . . . the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury. . . ."

Section 3450 forfeits the vehicle of an innocent owner or lienor. Section 26 expressly protects his property. The conflict as to the disposition of the automobile is direct, and that is the matter in controversy.

The great weight of judicial opinion is that illicit whiskey is not subject to a tax as distinguished from a penalty. This is held in the Second, Sixth and Eighth Circuits, and in the Court of Appeals of the District of Columbia. No Circuit Court of Appeals has held directly that such a tax is imposed. And the decisions of the lower courts are overwhelmingly to the effect that § 26, National Prohibition Act and R. S. § 3450 are in direct conflict. It is so held by the Circuit Courts of

Appeals of the Second, Fifth, Sixth and Eighth Circuits, and the Court of Appeals of the District of Columbia. The Ninth Circuit has certified the question here in *Port Gardner Inv. Co.* v. *United States, post,* p. 564.

There is shown in the margin substantially in chronological order the reported decisions, since National Prohibition, in the Circuit Courts of Appeals and District Courts, bearing on the application of § 3450 in respect of intoxicating liquors.[1]

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[1] *United States* v. *Essex* (N. D. Ga., 1920), 266 Fed. 138. Libel under § 3450. It did not appear that the liquor was for beverage purposes. *Held,* lawful to make non-beverage liquor; United States may elect to proceed under § 3450 or § 26.

United States v. *Haynes* (S. D. Fla., 1920), 268 Fed. 1003. *Held,* § 26 covers every case of illegal transportation of liquor, and § 3450 inconsistent with it. *Affirmed,* 1921, by C. C. A., 5th Cir., 274 Fed. 926.

Reed v. *Thurmond* (C. C. A., 4th Cir., 1920), 269 Fed. 252, reversing conviction in W. D. S. Car., under R. S. § 3296, removing distilled liquor from warehouse without paying tax. *Held,* National Prohibition Act inconsistent with scheme of revenue protection embodied in Revised Statutes.

Ketchum v. *United States* (C. C. A., 8th Cir., 1921), 270 Fed. 416, reversing E. D. Ark. Indictment and conviction under R. S. §§ 3242, 3257, 3260, and 3279, all relating to distilling. *Held,* provisions directed to secure revenue from manufacture and sale of intoxicating liquors inconsistent with and repealed by law absolutely prohibiting such manufacture and sale.

United States v. *Cole* (Mont., 1921), 273 Fed. 934. Demurrer to libel under § 3450 overruled. *Held,* § 26, National Prohibition Act, not inconsistent with it. Assumed taxability and dealt only with the remedy.

The Tuscan (S. D. Ala., 1921), 276 Fed. 55. Libel of vessel under § 3450 sustained on ground taxes were still imposed.

Payne v. *United States* (C. C. A., 5th Cir., 1922), 279 Fed. 112, affirming N. D. Ga. Libel under § 3450 sustained. Transportation occurred in January, 1920, a few days after National Prohibition Act took effect; nothing to indicate spirits were not in existence then and subject to tax. *Held,* § 3450 is not repealed, but is superseded only where facts of particular case show matters charged to violate it arise solely under National Prohibition Act as in *Haynes* case, *supra.*

3. The opinion proceeds on the theory that transportation of whiskey in the automobile is not shown outside the claim of the Garth Motor Company. And it is held

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Reo Company v. *Stern* (N. D. Ga., 1922), 279 Fed. 422. Suit by vendor under conditional sale contract to recover car forfeited under § 3450 and sold to defendant. Subsequently, drivers convicted under National Prohibition Act for transporting. Court directed verdict for defendant. *Held*, § 3450 repealed so far as transporting was concerned, but still effective for deposit and concealment; presumption of validity of judgment not overcome.

Lewis v. *United States* (C. C. A., 6th Cir., 1922), 280 Fed. 5, reversing judgment of forfeiture under § 3450, in E. D. Tenn. *Held*, § 3450 repealed to extent of inconsistency with National Prohibition Act. Taxes on liquor no longer payable and hence there can be no intent to defraud in not paying them.

United States v. *Buick* (Mont., 1922), 280 Fed. 517. Libel under § 3450 sustained. Earlier opinion in *United States* v. *Cole*, 273 Fed. 934, *held* strengthened by Willis-Campbell Act.

United States v. *Packard* (E. D. Mich., 1922), 284 Fed. 394. Forfeiture under customs laws. Petition for return granted. *Held*, that forfeiture provisions were without application because National Prohibition Act made importation unlawful. It appeared that driver escaped and no forfeiture could be had under § 26.

Ford v. *United States* (C. C. A., 8th Cir., 1922), 284 Fed. 823, reversing E. D. Ark. Judgment of forfeiture under § 3450 reversed. *Held*, § 3450 not applicable (no question of repeal); there is no tax shown to be due United States; § 26 applies.

McDowell v. *United States* (C. C. A., 9th Cir., 1923), 286 Fed. 521, reversing D. Mont. *Held*, § 3450 repealed by National Prohibition Act in case of transportation of liquor on which taxes have not been paid.

Studebaker v. *United States* (C. C. A., 9th Cir., 1923), 289 Fed. 256, reversing D. Mont. *Per curiam* on authority of *McDowell* case.

United States v. *Torres* (Md., 1923), 291 Fed. 138. *Held*, § 3450 not repealed, but after conviction forfeiture proceedings must be under § 26.

United States v. *Essex* (Mont., 1923), 291 Fed. 479. Libels under § 3450 sustained. *Held*, if any doubt as to matter, it had been settled by Willis-Campbell Act.

The Cherokee (S. D. Tex., 1923), 292 Fed. 212. Libel of vessel under § 3450 for carrying liquor on which tax had not been paid.

that, the dismissal being set aside, hearing on the question whether Killian was transporting the whiskey may be had in the lower court. It seems to me the litigation need not be so delayed, and that the important question

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Held, § 3450 has not been repealed by National Prohibition Act in view of Willis-Campbell Act.

United States v. *Cadillac* (E. D. Ill., 1923), 292 Fed. 773. Libel under § 3450 of auto carrying distilled liquor bearing export stamps but not bound for any port. Had no other stamps. *Held,* presumption of intent to defraud United States. § 3450, if repealed, had been restored by Willis-Campbell Act.

United States v. *Buick* (S. D. Calif., 1924), 300 Fed. 584. Three libels under § 3450. In two cases, moonshine was being transported within State. In other, whiskey came from Mexico. First two dismissed. *Held,* § 3450 has no application to mere transportation of illicit liquor in violation of National Prohibition Act. Must be fair presumption of intent to defraud United States of tax. But libel as to Mexican whiskey sustained because of intent to defraud of customs duties.

United States v. *Ford* (E. D. Tenn., 1924), 1 F. (2d) 654. *Held,* § 3450 not in direct conflict with § 26 and re-enacted by Willis-Campbell Act.

United States v. *Bay State Roadster* (Conn., 1924), 2 F. (2d) 616. Libel under § 3450. Motion to dismiss denied. *Held,* that if repealed § 3450 re-enacted by Willis-Campbell Act. It applies only where offense charged is defrauding United States of tax, and not in case of mere transportation. Burden of showing intent to defraud on United States. This burden sustained because allegations of libel were admitted by motion.

United States v. *Ford* (W. D. Tenn., 1924), 2 F. (2d) 882. Libel under § 3450 sustained. Auto found abandoned containing non-taxpaid liquor. *Held,* § 3450 re-enacted by Willis-Campbell Act.

United States v. Ford Coupe (W. D. La., 1924), 3 F. (2d) 64. Libel under § 3450 sustained. Man arrested on road for transporting. *Held,* whatever basis for holding § 3450 repealed removed by Willis-Campbell Act.

United States v. *White Truck* (W. D. Wash., 1925), 4 F. (2d) 413. Decree of forfeiture under § 3450 of car containing imported liquors. *Held,* § 3450 re-enacted by Willis-Campbell Act.

United States v. *Garth Motor Co.* (C. C. A., 5th Cir., 1925), 4 F. (2d) 528, affirming N. D. Ala. No. 115—this case.

pressing for decision should be decided now. It is true that the allegations of the company's claim are not to be considered on the motion to quash the libel; but, quite

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United States v. *Chevrolet* (W. D. Wash., 1925), 4 F. (2d) 612. Libel under § 3450 of truck containing whiskey run over border. Driver and others indicted for conspiracy to violate National Prohibition Act. Decree of forfeiture. *Held*, § 3450 applies when taxes are due and unpaid as on illegally imported liquors. Case not affected by indictment; car is held for different offense.

United States v. *Mack* (C. C. A., 2d Cir., 1925), 4 F. (2d) 923, affirming S. D. N. Y. Dismissed libel under § 3062 (condemning vessel containing illegally imported merchandise). Offense was in April, 1921. *Held*, that section not then in force. Carriage of illegally imported liquors is within the terms of § 3062 and § 26, so later and milder provision prevails.

Commercial Credit Co. v. *United States* (C. C. A., 6th Cir., 1925), 5 F. (2d) 1, reversing N. D. Ohio. Libel under § 3450. Car used for removal of liquor. Seizure under § 26 and those in charge convicted thereunder. Forfeiture reversed. *Held*, there is direct conflict. Liquor not subject to tax, for § 600 does not apply, and § 35 forbids issuance of stamps. § 3450, repealed by inconsistency with National Prohibition Act; not within terms of Willis-Campbell Act. § 26 protects property of innocent owners; § 3450 forfeits it, and this is a conflict.

United States v. *Marmon* (N. D. Ga., 1925), 5 F. (2d) 113. Judgment of forfeiture under § 3450. *Held*, United States must show specific intent to defraud; that is done by showing anyone has possession of liquor on which no tax has been paid, and has no intention of paying it.

United States v. *Milstone* (Ct. App. D. C., 1925), 6 F. (2d) 481, affirming Municipal Court, D. C. Dismissal of libel under § 3450 affirmed. Car containing moonshine abandoned by driver who was not apprehended. Seized "on behalf of" collector of internal revenue. *Held*, § 3450 has no application. No tax can be paid on such liquor, for issuance of stamps forbidden. Failure to pay tax mere incident of illegal possession and transportation, unlawful in any event. Unless two statutes distinguished, § 26 dead letter.

United States v. *Deutsch* (N. J.), 8 F. (2d) 54. Deutsch convicted of violation of National Prohibition Act. Owner of car in which he was transporting, and which he had rented, gave bond for its release and moves to discharge bond. Granted. *Held*, § 26 and

independently of the company's allegations, the court would be fully warranted in holding that Killian was found offending against § 26. The Government does not

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not § 3450 applies; owner of auto being innocent, there can be no forfeiture.

United States v. *Ford* (Tenn., 1925). Not reported. Libel under § 3450 dismissed.

National Bond & Investment Co. v. *United States* (C. C. A., 7th Cir., 1925), 8 F. (2d) 942, reversing E. D. Ill. Libel under § 3450 of car seized in 1924 for transporting. Driver pleaded guilty to violation of National Prohibition Act. Libel set forth that liquor came from Canada and was brought in without payment of customs duties. No averment this car brought it in. Decree of forfeiture reversed. *Held,* since passage of Willis-Campbell Act, it cannot be held that § 3450 was repealed by National Prohibition Act. Must show intent to defraud by establishing that car was used in smuggling; no such averment here.

United States v. *Reo* (C. C. A., 2d Cir., 1925), 9 F. (2d) 529, affirming E. D. N. Y. Two libels of auto truck. One under § 26, for transportation of whiskey without permit; other under § 3450 charging removal and concealment to avoid tax. Truck stopped on Long Island carrying whiskey. No conviction of driver; *bona fide* claimant. District Court dismissed both libels. *Held,* when vehicle is used in transporting, conviction of offender is essential to its forfeiture, at least when there is *bona fide* lienor. Under such circumstances, direct conflict between § 26 and § 3450, and latter does not apply at all. No decision as to whether same is true, if there be no such lien.

United States v. *Chevrolet* (E. D. Mo., 1925), 9 F. (2d) 85. Libel under § 3450 dismissed. Driver arrested while transporting illicit liquor; not yet tried. *Held,* no tax, as distinguished from penalty, on manufacture of illicit liquor; on these facts irreconcilable conflict between § 3450 and § 26, and latter applies.

United States v. *Three Quarts Whiskey* (S. D. N. Y., 1925), 9 F. (2d) 208. Libel of automobile under § 3450 dismissed, on ground that § 26 had superseded § 3450.

Compare *The Ella* (S. D. Fla., 1925), 9 F. (2d) 411; *United States* v. *Lincoln* (N. D. N. Y., 1925), 11 F. (2d) 551; *The Squanto* (C. C. A., 2d Cir., 1926), 13 F. (2d) 548; *United States* v. *Chevrolet* (W. D. Wash., 1926), 13 F. (2d) 948; *Weeke* v. *United States* (C. C. A., 8th Cir., 1926), 14 F. (2d) 398.

here contend that he was not taken while violating that section; it does not attempt to avoid decision on the merits. On the other hand it urges that, where one is taken in the act of transporting whiskey in the automobile of another, the vehicle may be forfeited, notwithstanding the owner appears and shows that he was innocent. It insists that, in case of conviction of the driver for transportation, the interest of the guilty may be forfeited; and, if the tax is not paid on the illicit beverage, the interest of the innocent owner may be confiscated. The claimant challenges that position squarely.

The information filed by the United States, September 18, 1923, states that this is a "case of seizure on land under the internal revenue laws of the United States"; there is attached and made a part of the information an affidavit and sworn complaint by R. A. Smith, a federal prohibition agent, which charges that Killian on or about August 11, 1923, unlawfully had in his possession 27 quarts of whiskey for beverage purposes, otherwise than as authorized by the National Prohibition Act. And the information alleges that Edgar N. Read, acting prohibition director, seized the automobile described "which said automobile was then and there in the possession of one Ed L. Killian and being used by him for the purpose of depositing and concealing" the 27 quarts of whiskey; that the automobile was said to belong to the Garth Motor Company, and that Read "now has the same in his custody." It states that the automobile was being used by Killian with intent to defraud the United States of taxes on the whiskey, and the automobile "then and there contained" the whiskey.

The information—with apparent purpose—avoids the use of the word "removal" found in § 3450; it does not allege that the whiskey had been "withdrawn," and so was subject to the $2.20 tax specified in § 600 (a); and it also avoids the word "transporting" used in § 26. It

does not show whether the automobile was moving or standing still when discovered and seized by the prohibition officers. If transportation in the automobile had been alleged, the owner would have opportunity to show his innocence under § 26. The purpose of the pleader in avoiding the use of the word "transporting" was to forfeit the automobile of an innocent owner on the theory that § 3450 would then apply, and that § 26 need not be followed.

When the information was filed, the court issued a writ of attachment, commanding the marshal to attach the automobile "which is now being held by Edgar N. Read, acting prohibition director," to detain it until the further order of the court and to give notice to the claimant. The marshal made his return that he had executed the writ by handing a copy to Acting Director Read and by seizing the automobile. December 6, 1923, the claimant filed a motion to quash the libel. April 14, 1924, it filed its claim, alleging that the title to the automobile which was seized while being used by Killian "in and about the unlawful transportation of intoxicating liquors" was in the company, subject to a conditional sales contract, and gave the bond provided for in § 26, which was approved by the district judge. The motion to quash was sustained and the libel was dismissed. The district judge filed no opinion. The Circuit Court of Appeals affirmed the judgment. 4 F. (2d) 528. In its opinion that court said: "The position now taken by the government in this case is that the interest of an innocent owner or lienholder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder of a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it

by some one who had the intent to defraud the government of its internal revenue tax." And the court held that § 3450 is superseded by § 26 in so far as there is conflict between them. It dealt with the case as one involving a violation of § 26.

I think that court's interpretation of the record was right. The prohibition agent discovered Killian in possession of an automobile containing 27 quarts of illicit whiskey in violation of the National Prohibition Act. The agent seized the vehicle; and, as it was his duty so to do, it must be found that he also seized the whiskey. The prosecution of Killian was commenced by filing complaint charging him with the crime of *illegal possession* in violation of that Act. The facts stated make out "transportation." The use of automobiles for transportation of, and in the furtherance of traffic in, intoxicating liquors for beverage purposes is so notorious that, when Killian was found unlawfully possessing illicit whiskey in the automobile, he reasonably may be held to have been transporting, even though the vehicle happened to be standing still at the moment the prohibition agent discovered the crime and made the seizure. The facts alleged in the libel and complaint attached to it justify a finding that he was using the automobile for transportation of the whiskey. On proof of such facts, a denial of transportation by Killian would not be entitled to respectful attention. Moreover, when these facts are considered in the light of what everyone knows, they utterly fail to support the allegation that Killian had the illicit whiskey concealed in the automobile *with intent to defraud the United States of a tax on that whiskey.* Indeed, the facts alleged negative that purpose. The attempt to make out a case against the revenues has no foundation in fact. It was impossible to pay the so-called tax. Crime had to be committed before liability for the imposition arose. Taxes are not so conditioned.

I am of opinion that the decree should be affirmed:

1. Section 3450 does not apply. There was no tax, as distinguished from penalty, imposed upon the whiskey that Killian had in the automobile when discovered by the prohibition agent.

2. Section 26 directs the proceedings to be taken in respect of the vehicle "whenever intoxicating liquors transported or possessed illegally shall be seized by an officer." The libel brings the case within the words and meaning of the clause just quoted.

I am authorized to say that MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND concur in this opinion.

YANKTON SIOUX TRIBE OF INDIANS *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 250. Argued October 7, 1926.—Decided November 22, 1926.

1. Where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes, impossible of performance does not, without more, relieve the promisor from performing the other. P. 358.
2. In an agreement, ratified by Congress in 1894, by which the Yankton Sioux Indians made a large cession of lands to the United States, it was stipulated, in part consideration for the cession and with respect to a small tract of other land containing pipe-stone quarries which were long claimed by the Indians under a Treaty of 1858 with encouragement from Congress, (1) that if the Government questioned their ownership of that reservation, including the fee of the land as well as the right to work the quarries, the Secretary of the Interior should as speedily as possible refer the matter to the Supreme Court of the United States for decision, and (2) that if this were not done within one year from the ratification of the agreement by Congress, such failure, on the part of the Secretary, should be a waiver by the United States of all rights to the ownership of such pipe-stone reservation, and the same should thereafter be solely the property of the tribe. The

Secretary, believing the provision for securing a decision of the Court was beyond the power of Congress, and being advised by the Attorney General that it was impracticable, made no attempt to carry it out. The land ceded was opened to settlement by the Government and passed largely into the possession of innocent purchasers, making restoration of the *status quo ante* impossible. In view of the equities growing out of these facts, *Held*, that the second of the alternative stipulations was enforceable even if the first was not. P. 356.

61 Ct. Cls. 40, reversed.

CERTIORARI (270 U. S. 637), to review a judgment of the Court of Claims rejecting the claim of the above named tribe of Indians for compensation for a tract of land in Minnesota embracing the Red Pipe Stone Quarries, which had been appropriated by the United States. See also, 53 Ct. Cls. 67, 81.

Mr. Jennings C. Wise for the petitioners.

Solicitor General Mitchell for the United States, was unable to support the reasoning of the Court of Claims, but he felt constrained to present the case fully in deference to the views of that Court and to the evident desire in Congress to have a judicial settlement of the controversy.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

By § 22 of the Indian Appropriation Act of April 4, 1910, c. 140, 36 Stat. 269, 284, jurisdiction was conferred upon the Court of Claims "to hear, and report a finding of fact, as between the United States and the Yankton tribe of Indians of South Dakota as to the interest, title, ownership and right of possession of said tribe" to a tract of land lying in the State of Minnesota embracing the Red Pipestone Quarries. That court, narrowly construing its powers, reported to Congress findings of fact without passing upon the question of title or determining any issue of law. 53 Ct. Cls. 67, 81. Congress subse-

quently, on June 3, 1920, c. 222, 41 Stat. 738, conferred upon the same court jurisdiction to adjudicate all claims of the Sioux Indians against the United States, and under that Act these Indians filed their petition in this proceeding praying judgment for an amount which would compensate them should it be found that the land in question had been misappropriated by the defendant. On January 9, 1925, while the case was pending, jurisdiction was conferred more definitely upon the same court to determine from the findings of fact theretofore made "the interest, title, ownership, and right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the 'Red Pipestone Quarries,'" and thereupon to determine, and enter judgment for, the amount "legally and equitably due from the United States" to petitioner for the same. c. 59, 43 Stat. 730. That court, in addition to its previous findings of fact, has now found that the Indians had been and still are permitted freely to visit and procure stone from the quarries and that they are free to do so as long as they may desire. Concluding that under the Treaty of 1858, 11 Stat. 743, the only interest possessed by the tribe in the quarries was this right, which had never been denied, the court dismissed the petition. 61 Ct. Cls. 40.

By the Treaty of 1858, these Indians ceded to the United States all the lands then owned, possessed, or claimed by them, wherever situated, except a particularly described tract of 400,000 acres. In consideration of that cession, among other things, the United States agreed (Art. VIII, p. 746) that "The said Yancton Indians shall be secured in the free and unrestricted use of the Red Pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose,

and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." In accordance with this agreement, the tract here in question, containing about 648 acres, was so surveyed and marked.

It is quite clear from all the surrounding circumstances that the Indians understood that by this provision there was granted to them full ownership of the tract; and their claim to that effect they have always persistently and stoutly maintained. The validity of that claim the Government has sometimes denied, and at other times apparently conceded. One conspicuous example of the latter character may be cited. In 1389 (c. 421, 25 Stat. 1012) Congress provided for the appraisement of the tract and the ascertainment of the actual value of a strip of land upon it then occupied by a railway company and the damage to the remainder of the tract by reason of the taking of the strip for railroad purposes. As a result of this legislation, $1,740.00 was collected from the railroad company and paid to the Indians. By the same Act it was provided that no part of the tract should be sold without the consent of a majority of the adult male members of the tribe, and that the proceeds of sales should be credited to the annuity fund of the Indians or expended according to their determination.

Nevertheless, the extent and character of the interest of the Indians has continued to be more or less in controversy. In 1891 (c. 240, 26 Stat. 764) provision was made for establishing Indian industrial and training schools in Minnesota, Michigan and Wisconsin, that in Minnesota to be located on the Quarry tract. Under this Act a school was established on the tract and opened early in 1893, possession being taken, it is conceded, of the entire tract. In the meantime, negotiations with the Indians had resulted in an agreement for the cession of an additional 150,000 acres of land, which agreement was

ratified by Congress in 1894. c. 290, 28 Stat. 314. In part consideration of the cession, the agreement contains the following article:

"Article XVI. If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. . . .

"If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land."

Concluding that the provision for referring the matter to this Court was beyond the constitutional power of Congress, the Secretary made no attempt to carry that part of the article into operation beyond submitting the question for the opinion of the Attorney General. That officer advised that compliance with it was impracticable. There the matter rested until 1897, at which time Congress, apparently on the theory that the Indian title had vested under the second paragraph of the article, by reason of the failure of the Secretary to refer the matter to this Court under the first paragraph, directed the Secretary of the Interior to negotiate with the Indians for the purchase of the land. c. 3, 30 Stat. 62, 87. Negotiations were had with the Indians and an agreement made for the transfer of their interests to the United States for the sum of $100,000, which agreement was transmitted to

Congress and referred to the Senate Committee on Indian Affairs. A majority of the committee reported adversely, but no action upon the report or upon the matter appears to have been taken by Congress. The acts of legislation and the proceedings in the Court of Claims followed as already outlined.

The lower court held, first, that the right reserved to the Indians by the Treaty of 1858 was a mere easement and this the Government had not interfered with; and, second, that Article XVI did not operate to enlarge this right but was a mere direction to refer the question of title to this Court, and, since that involved an unconstitutional attempt to extend the original jurisdiction of the Court, the provision on its face was impossible of performance and, therefore, void.

We pass the first ground without considering it, and come at once to the second. To begin with, it is not clear that the undertaking to refer the question to this Court was impossible of performance. The Attorney General, to whom the question was referred by the Secretary of the Interior, advised only that it was "impracticable." That it could not have been referred directly to this Court is obvious, since that would have been to invoke an original jurisdiction which the Court cannot exercise under the Constitution. But the matter might have gone to an inferior court and have been brought here by appeal, necessary legislation to that end, so far as required, being provided. Such a process, if it would not have satisfied the letter, would, at least, have satisfied the purpose of the provision. See *The Harriman,* 9 Wall. 161, 172–173; *Beebe* v. *Johnson,* 19 Wend. 500.

We prefer, however, to rest our decision upon other considerations. The Pipestone Quarries are of great antiquity. There the tribes, from time immemorial, have been wont to gather, under solemn truce, to quarry the stone, which is of a quality and texture not found else-

where, and mold it into pipes—the Indian symbols of peace. A great store of Indian myth and legend is associated with the spot; and it always has been regarded by the tribesmen with sentiments bordering upon religious reverence. While transferring to the United States their possessory title to other lands, the Indians had steadfastly refused to surrender what they conceived to be their peculiar right to this tract. Under these circumstances, it is by no means certain that they would have agreed to the cession at all without the provision in question. However that may be, it cannot be doubted that they regarded the undertaking of the Government set forth in Article XVI, as of great value, accepted it in good faith, and relied with the utmost confidence upon the alternative promise of Congress that in the event the matter was not referred to this Court all claims of the Government to the ownership of the tract would cease and the Indian title in fee be conclusively established.

To deny all efficacy to that part of the undertaking upon the ground that the other part was impossible of performance, and at the same time hold these wards of the Government to the terms of the cession for which the undertaking formed so important an element of consideration, would be most inequitable, and utterly indefensible upon any moral ground; and this is peculiarly true in view of the attitude of Congress in so dealing with the matter from time to time, as hereinbefore recited, as to justify a belief on the part of the Indians that their ownership was conceded. It is impossible, however, to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers; and nothing remains but to sanction a great injustice or enforce the alternative agreement of the United States in respect of the ownership of the Indians. The latter course is so

manifestly in accordance with ordinary conceptions of fairness that it would be unfortunate if any positive rule of law stood in the way of its accomplishment. We are of opinion that none exists. The judgment of the Court of Claims, that such an obstruction is to be found in the conclusion that the provision for referring the controversy to this Court was legally impossible of execution, cannot be sustained.

The general rule undoubtedly is, that where there is a legal impossibility of performance appearing on the face of the promise there is no contract in respect of it. But here the undertaking of the Government is in the alternative—that either the question of the title of the Indians shall be referred to this Court for determination, or, in default of that being done, title in fee shall vest in the Indians. Granted the impossibility of the first alternative, the Government, nevertheless, took the risk, and must, in accordance with its definite undertaking to that effect, suffer the stipulated consequence, in virtue of the principle that, where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes, impossible of performance does not, at least without more, relieve the promisor from performing the other.

In *Stevens* v. *Webb*, 7 Car. & P. 60, 62, the defendant gave a bond in the sum of 35*l* to obtain the release of a prisoner held in custody on a *ca. sa.*, conditioned to surrender him at a time fixed. The court held the condition void on the ground that a defendant in execution, once discharged out of custody by the plaintiff, could not by law be retaken upon that judgment, but, nevertheless, enforced payment of the penalty, saying: "There was therefore one branch of the agreement that the defendant could not perform; and the law is, that, if an agreement is in the alternative, and one branch of the alternative cannot be performed, the party is bound to perform the other, which, in this case, is to pay 35*l*." There is an

earlier decision, rendered in 1798 in the Court of Common Pleas, upon exactly similar facts, to the same effect. *Da Costa* v. *Davis*, 1 Bos. & P. 242. In *Drake* v. *White*, 117 Mass. 10, 13, *Stevens* v. *Webb*, *supra*, was cited as authority for the proposition that, where one part of an alternative promise, originally possible, has subsequently become impossible of fulfilment, the other part of the alternative must nevertheless be performed. See also *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 443; *State* v. *Executors of Thomas Worthington*, 7 Ohio 171, 173; *Jacquinet* v. *Boutron*, 19 La. Ann. 30, 32.

That the United States has taken and holds possession of the entire Quarry tract of 648 acres is not in dispute; and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.

Judgment reversed

ANDERSON v. SHIPOWNERS ASSOCIATION OF THE PACIFIC COAST ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 306. Argued October 28, 29, 1926.—Decided November 22, 1926.

1. A suit by an individual, claiming injury, on behalf of himself and all others in like case, to enjoin the maintenance of a combination in restraint of commerce violating § 1 of the Anti-Trust Act, is authorized by §§ 4 and 16 of the Clayton Act. P. 360.
2. Ships and those who operate them are instrumentalities of commerce and within the Commerce Clause, no less than cargoes. P. 363.
3. A combination whereby the owners and operators of ships engaged in interstate and foreign commerce surrender completely their freedom of action in respect of the employment of seamen, to associations formed to regulate and control the subject, violates the Anti-Trust Act. P. 362.

4. Where the bill alleged such a combination, the direct and necessary consequence of which was to restrain interstate and foreign commerce, it was unnecessary to add an allegation that such was the specific intent of those in the combination. P. 363.
5. Therefore it is unimportant in this case to inquire whether the object of the combination was merely to regulate the employment of men and not to restrain commerce. P. 363.

10 F. (2d) 96, reversed.

CERTIORARI (271 U. S. 652), to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a bill to restrain an unlawful combination, and for damages.

Mr. H. W. Hutton for the petitioner.

Mr. Chauncey F. Eldridge, with whom *Messrs. Frederick C. Peterson* and *George O. Bahrs* were on the briefs, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin the respondents from maintaining a combination in restraint of interstate and foreign commerce in violation of § 1 of the Anti-Trust Act, c. 647, 26 Stat. 209, and to recover damages. Such a suit is authorized by §§ 4 and 16 of the Clayton Act, c. 323, 38 Stat. 730, 731, 737. *Duplex Co.* v. *Deering,* 254 U. S. 443, 464–465. Upon respondents' motion, the district court dismissed the bill of complaint, apparently upon the merits, and the circuit court of appeals affirmed the decree. 10 F. (2d) 96. The only question necessary to be considered here is whether the bill states a case within the Anti-Trust Act.

The bill is not concisely drawn and the application of its allegations is to some degree obscured by references to acts of Congress regulating commerce, other than the Anti-Trust Act. For present purposes the pertinent allegations, shortly stated, are as follows: Petitioner is a

seaman and has followed that calling for more than twenty years on ships engaged in the carrying trade among the states on the Pacific Coast and with foreign countries. He is a member of the Seaman's Union of America, having a membership of about 10,000 seamen engaged in various forms of maritime service in the same field; and he sues on their behalf as well as his own. The members of the respondent associations own, operate or control substantially all the merchant vessels of American registry engaged in interstate and foreign commerce among the ports of the Pacific Coast and with foreign countries. These associations and their members have entered into a combination to control the employment, upon such vessels, of all seamen upon the Pacific Coast, and to that end the associations have established and maintain offices in San Francisco and San Pedro, California, where seamen are engaged and supplied to the operators of the vessels. Among other requirements, every seaman seeking employment is compelled to register, receive a number and await his turn according to the number, before he can obtain employment, the result of which is that seamen, well qualified and well known, are frequently prevented from obtaining employment at once, when, but for these conditions, they would be able to do so. A certificate is issued to each seaman which he is obliged to carry and present in order to obtain employment. The certificate, in part, recites that no person will be employed unless registered; that the certificate must be delivered to the master of the vessel upon articles being signed; that the certificate is the personal record of the seaman and the basis of his future employment. At the same time, two cards are issued,—one to the seaman, assigning him to a specified employment, and another to the ship, reciting the capacity in which the seaman is to be employed, with the statement that "he must not be employed on your ship in any capacity unless he presents

an assignment card, grey in color, issued by us and addressed to your vessel designating the position to which we have assigned him." The associations fix the wages which shall be paid the seamen. Under the regulations, when a seaman's turn comes, he must take the employment then offered or none, whether it is suited to his qualifications or whether he wishes to engage on the particular vessel or for the particular voyage; and the officers of the vessels are deprived of the right to select their own men or those deemed most suitable. Without a compliance with the foregoing requirements, no seaman can be employed on any of the vessels owned or operated by members of the associations.

It is further alleged that the petitioner sought employment through the San Francisco office of the associations and was refused registration because he failed to produce a discharge book. At a later time, he was employed by the mate of a vessel engaged in coastwise interstate traffic, but was required by the mate to apply at the office of the associations for assignment as a sailor; that upon application being thus made such assignment was refused; that, nevertheless, he was directed by the mate to report on board for duty; that he did report, but was informed by the mate that he had been ordered to take no seamen except through the office of the associations, and in consequence petitioner lost the employment to his damage in a sum stated.

From these averments, the conclusion results that each of the shipowners and operators, by entering into this combination, has, in respect of the employment of seamen, surrendered himself completely to the control of the associations. If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to

refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce and within the Commerce Clause no less than cargoes. *Second Employers' Liability Cases,* 223 U. S. 1, 47–49. And, as was said by this Court in *United States* v. *Colgate & Co.,* 250 U. S. 300, 307, "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade." That the effect of the combination now under consideration, both as to the seamen and the owners, is precisely what this language condemns, is made plain by the allegations of the bill which we have just summarized. The absence of an allegation that such was the specific intent is not important, since that is the necessary and direct consequence of the combination and the acts of the associations under it, and they cannot be heard to say the contrary. *United States* v. *Patten,* 226 U. S. 525, 543. It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate the employment of men and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint. *Duplex Co.* v. *Deering, supra,* p. 468; *Ellis* v. *Inman, Poulsen & Co.,* 131 Fed. 182, 186.

Respondents rely on *Industrial Association* v. *United States,* 268 U. S. 64; *United Leather Workers* v. *Herkert,* 265 U. S. 457, and *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344; but these cases are not in point. The conspiracies or combinations in all three related to local

matters—the first, to building in San Francisco, the second, to manufacturing, and the third, to mining operations—and the effect upon interstate commerce was held to be purely indirect and secondary. Neither the making of goods nor the mining of coal is commerce; and the fact that the things produced are afterwards shipped or used in interstate commerce does not make their production a part of it. Nor is building commerce; and the fact that the materials to be used are shipped in from other states does not make building a part of such interstate commerce. In the *Industrial Association* case, after a reference to the two earlier decisions, pp. 80–82, it was said (p. 82): "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." Here, however, the combination and the acts complained of did not spend their intended and direct force upon a local situation. On the contrary, they related to the employment of seamen for service on ships, both of them instrumentalities of, and intended to be used in, interstate and foreign commerce; and the immediate force of the combination, both in purpose and execution, was directed toward affecting such commerce. The interference with commerce, therefore, was direct and primary, and not, as in the cases cited, incidental, indirect and secondary.

Taking the allegations of the bill at their face value, as we must do in the absence of countervailing facts or explanations, it appears that each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and

agreed to abide by the will of the associations. Such is the fair interpretation of the combination and of the various requirements under it, and this is borne out by the actual experience of the petitioner in his efforts to secure employment. These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-Trust Act.

Decree reversed and cause remanded to the district court for further proceedings in conformity with this opinion.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

VILLAGE OF EUCLID ET AL. *v.* AMBLER REALTY COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 31. Argued January 27, 1926; reargued October 12, 1926.—Decided November 22, 1926.

1. A suit to enjoin the enforcement of a zoning ordinance with respect to the plaintiff's land, need not be preceded by any application on his part for a building permit, or for relief under the ordinance from the board which administers it, where the gravamen of the bill is that the ordinance of its own force operates unconstitutionally to reduce the value of the land and destroy its marketability, and the attack is not against specific provisions but against the ordinance in its entirety. P. 386.
2. While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. P. 386.

3. The question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined by considering the building or the thing, not abstractly but in connection with the circumstances and the locality. P. 387.

4. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. P. 388.

5. No serious difference of opinion exists in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries, and structures likely to create nuisances. P. 388.

6. The same power may be extended to a general exclusion from residential districts of all industrial establishments, though some may not be dangerous or offensive; for the inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. P. 388.

7. The power to relegate industrial establishments to localities separate from residential sections is not to be denied upon the ground that its exercise will divert a flow of industrial development from the course which it would follow and will thereby injure the complaining land-owner. P. 389.

8. The police power supports also, generally speaking, an ordinance forbidding the erection in designated residential districts, of business houses, retail stores and shops, and other like establishments, also of apartment houses in detached-house sections—since such ordinances, apart from special applications, can not be declared clearly arbitrary and unreasonable, and without substantial relation to the public health, safety, morals, or general welfare. P. 390.

9. Where an injunction is sought against such an ordinance, upon the broad ground that its mere existence and threatened enforcement, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court, finding the ordinance in its general scope and dominant features valid, will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown

to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. P. 395.
297 Fed. 307, reversed.

APPEAL from a decree of the District Court enjoining the Village and its Building Inspector from enforcing a zoning ordinance. The suit was brought by an owner of unimproved land within the corporate limits of the village, who sought the relief upon the ground that, because of the building restrictions imposed, the ordinance operated to reduce the normal value of his property, and to deprive him of liberty and property without due process of law.

Mr. James Metzenbaum for the appellants.

The police power is very wide, *C. B. & Q. Ry.* v. *Drainage Commrs.*, 200 U. S. 561; *Munn* v. *Illinois*, 94 U. S. 113, and adequate to meet new conditions, *Bacon* v. *Walker*, 204 U. S. 317; *Hadachek* v. *Los Angeles*, 239 U. S. 394; *Sligh* v. *Kirkwood*, 237 U. S. 52; *Barbier* v. *Connolly*, 113 U. S. 27; *Gundling* v. *Chicago*, 177 U. S. 183; *Bank* v. *Haskell*, 219 U. S. 104. Legislation under it is presumptively legal. *Sinking Fund Cases*, 99 U. S. 718; *Powell* v. *Penn*, 127 U. S. 684. Courts will not assume the function of the legislative branch, *Barbier* v. *Connolly*, *supra*. To be unconstitutional, the legislation must have no relation to health and welfare. *Cusack Co.* v. *Chicago*, 242 U. S. 526; *Salt Lake City* v. *Foundry Co.*, 55 Utah 452; *State* v. *Withnell*, 91 Neb. 513; *Armour & Co.* v. *North Dakota*, 240 U. S. 510. Unconstitutionality must be plainly and palpably clear. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Cusack Co.* v. *Chicago*, *supra*. The law must be plainly and manifestly unreasonable, *Cusack Co.* v. *Chicago*, *supra*; *Porter* v. *Wilson*, 239 U. S. 170. Illegality must be clearly established, *Sinking Fund Cases*, *supra*; *Powell* v. *Pennsylvania*, 127 U. S. 678; *People* v. *Warden*, 216 N. Y. 154; *People* v. *Schweinter Press*, 214 U. S. 395. Financial

loss is not the test, *Hadachek* v. *Los Angeles,* 239 U. S. 394; *United States* v. *Noble,* 237 U. S. 78; *Reimman* v. *Little Rock,* 237 U. S. 171; *Erie R. R. Co.* v. *Williams,* 233 U. S. 700; *Mugler* v. *Kansas,* 123 U. S. 623; *Sheehan* v. *Scott,* 145 Cal. 684; *Cochrane* v. *Preston,* 108 Md. 220; *State* v. *Cunningham,* 97 Oh. St. 130; *Biggs* v. *Steinway,* 229 N. Y. 320. Local conditions must be considered, *McLean* v. *Denver,* 203 U. S. 38; *Ohio Co.* v. *Indiana,* 177 U. S. 190; *Affeld* v. *N. Y. Co.,* 198 U. S. 361; *Welch* v. *Swasey,* 214 U. S. 91; *Pleasay* v. *Ferguson,* 163 U. S. 537; *Brown* v. *Walling,* 204 U. S. 320.

Though there is unquestionably a "taking" under the exercise of police power, yet that taking is not such as is inhibited by or as requires compensation under the Constitution. This view is recognized in the case of *Interstate Ry. Co.* v. *Commonwealth,* 207 U. S. 79. See also *Hadachek* v. *Los Angeles,* 239 U.S. 394; *Welch* v. *Swasey,* 214 U. S. 91; *Cochrane* v. *Preston,* 108 Md. 220; *Publicity Co.* v. *Supt. of Building,* 218 N. Y. 540; *Doan Co.* v. *Cleveland,* 97 Oh. St. 130; *Barbier* v. *Connolly,* 113 U. S. 27. Classification is permitted and even necessary. *C. & N. W. Ry.* v. *R. R. Comm.,* 280 Fed. 394; *Welch* v. *Swasey, supra; Hadachek* v. *Los Angeles, supra; Powell* v. *Pennsylvania,* 127 U. S. 678.

The courts will not substitute their judgment for that of the legislature. *Armour & Co.* v. *North Dakota,* 240 U. S. 513; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Benson* v. *Henkel,* 198 U. S. 1; *Cusack* v. *Chicago,* 242 U. S. 526; *Salt Lake City* v. *Foundry Works,* 55 Utah 447; *C. B. & Q. R. R.* v. *Haggarty,* 67 Ill. 113; *Central R. R.* v. *Pettus,* 113 U. S. 127. The general application and not one single instance must be the guide. *Rochester* v. *West,* 164 N.Y. 510; *Tenement House Dept.* v. *Moeschen,* 179 N. Y. 325; *St. Louis Poster Co.* v. *St. Louis,* 249 U. S. 269; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 500; *Benz* v. *Kremer,* 142 Wis. 1.

On the validity of the provisions of the ordinance concerning the Board of Appeals, see *People* v. *Board of Appeals,* 234 N. Y. 484; *Welch* v. *Swasey,* 214 U. S. 91; *Ayer* v. *Cram,* 242 Mass. 30; *Broadway Co.* v. *Nulle,* 203 App. Div. 468; *Sanders* v. *Walsh,* 108 Misc. 193; *Mutual Film Co.* v. *Industrial Comm.,* 236 U. S. 230; *Presbyterian Church* v. *Edgcomb,* 109 Neb. 18; *Chicago R. R. Co.* v. *R. R. Comm.,* 280 Fed. 387; *Merrick* v. *Halsey & Co.,* 242 U. S. 590.

The constitutionality of comprehensive zoning ordinances was involved in the following cases:

New York, (favorable): *Lincoln Trust Co.* v. *Williams Corp.,* 229 N. Y. 313; *People* v. *Board of Appeals, supra; In re Russell,* 158 N. Y. Supp. 162; *People* v. *Ludwig,* 218 N. Y. 240; *Barker* v. *Switzer,* 209 App. Div. 151; *Wulfsohn* v. *Burden,* 241 N. Y. 288. Massachusetts, (favorable): *Building Inspector* v. *Stoklosa,* 250 Mass. 52; *Spector* v. *Milton,* 250 Mass. 63; *Brett* v. *Building Commissioner,* 250 Mass. 73; *Welch* v. *Swasey,* 193 Mass. 364, affd. 214 U. S. 91; *Parker* v. *Commonwealth,* 178 Mass. 199; *Attorney General* v. *Williams,* 174 Mass. 476; *Ayer* v. *Cram,* 242 Mass. 30. New Jersey decisions at least partially opposed are: *State* v. *Nutley,* 99 N. J. L. 389; *Handy* v. *South Orange,* 118 Atl. 838; *Ignaciumas* v. *Risley,* 98 N. J. L. 712; *Max* v. *Building Inspector,* 127 Atl. 785; *Schaite* v. *Senior,* 97 N. J. L. 390; *Cliffside Park Co.* v. *Cliffside,* 96 N. J. L. 278. Maryland, (opposed): *Goldman* v. *Crowther,* 147 Md. 282. Missouri, (opposed): *St. Louis* v. *Evraiff,* 301 Mo. 231; *State* v. *McKelvey,* 256 S. W. 495. Texas: *Spann* v. *Dallas,* 111 Texas 350, is not properly a zoning case. But see *Dallas* v. *Mitchell,* 245 S. W. 944. California, (favorable): *Miller* v. *Board,* 195 Cal. 477; *Zahn* v. *Board,* 195 Cal. 497. Cf. *Hadachek* v. *Los Angeles,* 239 U. S. 394; *Ex parte Quong Wo,* 161 Cal. 220. Kansas, (favorable): *Ware* v. *Wichita,* 113 Kan. 153; *West* v. *Wichita,* 118 Kan. 265. Iowa, (favorable): *Des*

Moines v. *Manhattan Oil Co.*, 193 Iowa 1096. Louisiana, (favorable): *Calvo* v. *New Orleans*, 136 La. 480; *State* v. *New Orleans*, 142 La. 73; *Civello* v. *New Orleans*, 154 La. 271. Connecticut, (favorable): *Whitney* v. *Windsor*, 95 Conn. 357. District of Columbia, (favorable): *Schwartz* v. *Brownlow*, 50 App. D. C. 279. Minnesota, (favorable): *Banner Grain Co.* v. *Houghton*, 297 Fed. 317; *Twin City Co.* v. *Houghton*, 144 Minn. 1; *Beery* v. *Houghton*, 164 Minn. 146. Wisconsin, (favorable): *Carter* v. *Harper*, 182 Wis. 148; *Holzbauer* v. *Ritter*, 184 Wis. 35. Ohio, (favorable): *Perrysburg* v. *Ridgway*, 108 Oh. St. 245; *Morris* v. *Osborn*, 22 Oh. N. P. (N. S.) 549; *Youngstown* v. *Kahn Bros.*, 112 Oh. St. 654; *Bolce* v. *Hauser*, 111 Oh. St. 402.

See also: *Stephens* v. *Providence*, (not yet officially reported), 133 Atl. 614; *Wood* v. *Boston*, (not yet officially reported), 152 N. E. 62; *Deynzer* v. *Evanston*, 319 Ill. 226; *Aurora* v. *Burns*, *Id.* 84; *Fourcade* v. *San Francisco*, 196 Cal. 655; *State* v. *New Orleans*, 159 La. 324; *Bradley* v. *Board of Zoning Appeals*, (not yet officially reported), 150 N. E. 892.

The Ambler Company—without any application for revision, amendment or modification of the ordinance and without desiring to build any kind of structure whatsoever—hastened into court and applied for an injunction against the enforcement of the ordinance or any part of it. The decree struck down the entire ordinance. Under the conditions, the Company neither then had nor has now the right to bring into issue any question other than that the ordinance is fundamentally and *per se* in violation of the federal and state constitutions.

Until the complainant shall at least have applied for a permit to build some kind of structure, and until such permit shall have been denied, the complainant does not have the right to obtain an injunction upon the ground that the ordinance is unreasonable in its effect upon the property in question.

Mr. Newton D. Baker, with whom *Mr. Robert M. Morgan* was on the brief, for the appellee.

The recent industrial development of the City of Cleveland, following the railroad lines, has already reached the Village and to some extent extends over into it. In its obvious course, this industrial expansion will soon absorb the area in the Village for industrial enterprises. It is in restraint of this prospect that the ordinance seeks to operate. In effect it erects a dam to hold back the flood of industrial development and thus to preserve a rural character in portions of the Village which, under the operation of natural economic laws, would be devoted most profitably to industrial undertakings. This, the evidence shows, destroys value without compensation to the owners of lands who have acquired and are holding them for industrial uses.

Since the industrial development of a great city will go on, the effect of this attempted action necessarily is to divert industry to other less suited sites, with a consequent rise in value thereof; so that the loss sustained by the proprietors of land who cannot so use their land is gained by proprietors of land elsewhere. In other words, the property, or value, which is taken away from one set of people, is, by this law, bestowed upon another set of people, imposing an uncompensated loss on the one hand and a gain which is arbitrary and unnatural on the other hand, since it results, not from the operation of economic laws, but from arbitrary considerations of taste enacted into hard and fast legislation. Such legislation also tends to monopolize business and factory sites.

In the argument below it is alleged, that the Company could have no matured right of action until it had first made application for a permit as to specific proposed uses of its lands, taken appeals from refusals to grant such permit, and filed petition with the council of the Village for such amendments as it might deem necessary.

The wrong done to the plaintiff below was done when the ordinance was passed and continues as long as the ordinance is in existence. Prospective purchasers of land for commercial and industrial development will not even consider the plaintiff's land so long as the ordinance is in existence. To require the plaintiff to wait until he can find a purchaser sufficiently brave and sufficiently patient to buy a site in the teeth of this ordinance, bear the cost and delay of preparing plans, applying for a permit and having it rejected, perfecting an appeal and having it denied, and then exhausting the possibilities of petitions for amendment of the ordinance which would permit the proposed use, would, in fact, deprive the plaintiff of any remedy whatever, for no such complaisant purchasers can be found in a competitive real estate market. The plaintiff and others similarly situated with regard to their lands would simply be required to sit still and see the normal industrial and commercial development diverted, as purchasers passed them by and took less desirable land, free from the necessities of protracted litigation, in preference to the lands in the Village of Euclid, each acre of which would require litigation and lobbying before it could be devoted to entirely lawful and normal uses.

Ordinance No. 2812 is penal in character. That a court of equity will enjoin the enforcement of a void statute where the legal remedy is inadequate is no longer open to question, in view of the decisions of this Court. *Kennington* v. *Palmer,* 255 U. S. 100; *United States* v. *Schwartz, Id.* 102; *Adams* v. *Tanner,* 244 U. S. 590; *Truax* v. *Raich,* 239 U. S. 33; *Bloch* v. *Hirsch,* 256 U. S. 135; *Brown Holding Co.* v. *Feldman,* 256 U. S. 170.

Whether Ordinance No. 2812 rests for its authority upon the "power of local self-government" granted by § 3 of Art. XVIII of the Ohio Constitution, or upon the attempted donation of power to municipal corporations by §§ 4366–1 to 4366–12 of the General Code, the same

tests must be applied to its validity, and those tests are whether or not that ordinance is a reasonable and real exercise of the police power or an unreasonable and arbitrary exercise of the powers of local self-government and an impairment of the rights of property guaranteed to the plaintiff by the constitutions of the United States and of Ohio.

The ordinance does not, in fact, pursue any rational plan, dictated by considerations of public safety, health and welfare, upon which the police power rests. On the contrary, it is an arbitrary attempt to prevent the natural and proper development of the land in the Village prejudicial to the public welfare. This property in the interest of the public welfare, should be devoted to those industrial uses for which it is needed and most appropriate. Therefore, while it will be necessary for us to discuss "zoning" and point out what we believe to be the point of collision between the so-called zoning power and the Constitution of the United States, the appellee's primary interest is to protect its property against the damage wrought by this particular ordinance.

That municipalities have power to regulate the height of buildings, area of occupation, strengths of building materials, modes of construction, and density of use, in the interest of the public safety, health, morals, and welfare, are propositions long since established; that a rational use of this power may be made by dividing a municipality into districts or zones, and varying the requirements according to the characteristics of the districts, is, of course, equally well established. We believe it, however, to be the law that these powers must be reasonably exercised, and that a municipality may not, under the guise of the police power, arbitrarily divert property from its appropriate and most economical uses, or diminish its value, by imposing restrictions which have no other basis than the momentary taste of the public authorities.

Nor can police regulations be used to effect the arbitrary desire to have a municipality resist the operation of economic laws and remain rural, exclusive and aesthetic, when its land is needed to be otherwise developed by that larger public good and public welfare, which takes into consideration the extent to which the prosperity of the country depends upon the economic development of its business and industrial enterprises.

The municipal limits of the Village of Euclid are, after all, arbitrary and accidental political lines. The metropolitan City of Cleveland is one of the great industrial centers of the United States. If the Village may lawfully prefer to remain rural and restrict the normal industrial and business development of its land, each of the other municipalities, circumadjacent to the City of Cleveland, may pursue a like course. Thus the areas available for the expanding industrial needs of the metropolitan city will be restricted, the value of such land as is left available artificially enhanced, and industry driven to less advantageous sites. All this would be done at the expense of those land owners whose lands, being most advantageously located from an industrial point of view, have as a part of their right of property, which the constitutions of the Nation and the States undertake to protect, the expectation of value due to their superior availability for industrial development. *Kahn* v. *Youngstown*, 113 Oh. St. 17; *Pritz* v. *Messer*, *Id.* 89.

The distinction between the power of eminent domain and the police power is important. In the first place, there must be a public need, the property proposed to be taken must be taken for a public use, all the forms of law must be observed in the taking, and the private owner ultimately compensated. The courts do not allow the private owner to argue with the legislative authority in the exercise of its discretion as to what is a public need and his opinion is not important in the definitions

of a public use, but the books are full of cases in which the exercise of this power has been stayed, even against the legislative determination, where the proposed use was only colorably public and the plain purpose of the appropriation was private advantage, no matter how widely distributed. Even where the owner is to be fully compensated, his right to retain and use his own property is protected unless there is a real, as against a pretended, public need to take it and use it.

Quite different is the police power under which the ordinance in this case purports to be passed. In every ordered society the State must act as umpire to the extent of preventing one man from so using his property or rights as to prevent others from making a correspondingly full and free use of their property and rights. The abstract right of a man to build a fire trap is limited by the rights of other people not to have their houses subjected to the peril created by it. The right of a man to maintain a nuisance on his own property is limited by the rights of others not to be subjected to the danger of its proximity. Accordingly, the so-called police power is an inherent right on the part of the public umpire to prevent misuses of property or rights which impair the health, safety, or morals of others, or affect prejudicially the general public welfare.

The limitations imposed by the police power do not have to be compensated for, for the reason that they are inherent in the ownership. If I buy a piece of land I have no means of knowing whether or not it will be needed for the public use, and if any need develops, I must be compensated when the public takes it. But I always know when I buy land, that I may not devote it to uses which endanger the safety, health, or morals of others or make its use a common nuisance to the prejudice of the public welfare. Because of its nature, the exercise of the

police power has always been restrained to those uses of property which invade the rights of others, and courts consistently decline to permit an extension of the police power to uses of property involving mere questions of taste or preference or financial advantage to others. Unless the theory of our expanding civilization is wrong, the public welfare is advanced by the devotion of the most available sites to business and industry, as the need for them develops. Restrictions upon limited areas have always been established, when desired, by mutual contracts, and such restrictions have been upheld so long as they were reasonable, in view of the changing growth and development of the country. It has, however, only recently been suggested that use restrictions, which formerly lay in contract, may be imposed or abrogated by municipal regulation and that the fleeting legislative judgment and will of a municipal council can select which, out of a variety of admittedly innocent uses, it will permit the owners of land to enjoy. *Yates* v. *Milwaukee,* 10 Wall. 497.

Even if the world could agree by unanimous consent upon what is beautiful and desirable, it could not, under our constitutional theory, enforce its decision by prohibiting a land owner, who refuses to accept the world's view of beauty, from making otherwise safe and innocent uses of his land. The case against many of these zoning laws, however, is much stronger than this. The world has not reached a unanimous judgment about beauty, and there are few unlikelier places to look for stable judgments on such subjects than in the changing discretion of legislative bodies, moved this way and that by the conflict of commercial interests on the one hand, and the assorted opinions of individuals, moved by purely private concerns, on the other.

Perhaps the most often quoted definition of the police power is that of Judge Cooley. Constitutional Limita-

tions, 7th ed., p. 245. This limits the power to the establishment of rules to prevent the conflict of rights. See also, *Id.* 768, 839; *Truax* v. *Corrigan,* 257 U. S. 336; *People* v. *Road,* 9 Mich. 285; Tiedeman, State and Federal Control, § 146; Freund, Police Power, § 511. *Munn* v. *Illinois,* 94 U. S. 113, sustained the police power in the regulation of grain elevators, because such property was held to be affected with a public use, but the court sharply declined to regard the rule then established as an invasion of rights purely private. See also *Coppage* v. *Kansas,* 236 U. S. 1; *Wolf Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522; 267 *Id.* 552; *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393; *Eubank* v. *Richmond,* 226 U. S. 137.

It has not been difficult for this Court to vindicate the great guaranties of the Constitution against direct attack. The trouble comes when these guaranties of individual rights of liberty and property appear to stand in the way of some genuinely benevolent and praiseworthy object which enlists support or enthusiasm, and when only a little infringement of the right of the individual is asked to be indulged. Yet the danger of frittering away the constitutional guaranties by successive encroachments has always been apparent. *Railway Co.* v. *Commissioners,* 1 Oh. St. 77; *Miller* v. *Crawford,* 70 Oh. St. 207; *Williams* v. *Preslo,* 84 Oh. St. 345; *Coppage* v. *Kansas,* 236 U. S. 1; *Boyd* v. *United States,* 116 U. S. 616.

It is impossible to reconcile the rulings of the supreme courts of the States upon the questions here presented. Each case is, of course, decided on its own facts. Many of them presented familiar restrictions, more or less demonstrably involving the public safety, health, or morals. In some of the cases, although the opinions seem to sanction very wide extensions of the traditional police power, the facts involved do not necessitate the width of the rulings; but even this consideration does

not make it possible to follow through these cases any thread which leads to an authentic definition and application of the constitutional restraints upon unlimited extensions of the police power. *Spann* v. *Dallas*, 111 Tex. 350; *Fitzhugh* v. *Jackson*, 132 Miss. 585; *State* v. *Thomas*, 96 W. Va. 628; *Tighe* v. *Osborne*, 131 Atl. 801; *Goldman* v. *Crowther*, 147 Md. 282; *Mayor* v. *Turk*, 129 Atl. 512; *State* v. *McKelvey*, 301 Mo. 130; *Ignaciunas* v. *Risley*, 98 N. J. L. 712; *Lachman* v. *Haughton*, 134 Minn. 226; *Roerig* v. *Minneapolis*, 136 Minn. 479; *Blackman* v. *Atlanta*, 151 Ga. 507; *State* v. *Edgcombe*, 108 Neb. 859; *Byrne* v. *Realty Co.*, 129 Md. 202; *Illinois* v. *Friend*, 261 Ill. 16; *Windsor* v. *Whitney*, 95 Conn. 357; *Losick* v. *Binda*, 128 Atl. 619; *Sarg* v. *Hooper*, 128 Atl. 376; *Ingersoll* v. *South Orange*, 128 Atl. 393; *Becker* v. *Dowling*, 128 Atl. 395; *Summit Co.* v. *Board*, 129 Atl. 819; *Reimer* v. *Dallas*, 129 Atl. 390; *Plymouth* v. *Bigelow*, 129 Atl. 203; *Printz* v. *Board of Adjustment*, 129 Atl. 123; *Passaic* v. *Patterson Bill Co.*, 72 N. J. L. 285; *Youngstown* v. *Kahn*, 113 Oh. St. 17; *Pritz* v. *Messer*, 113 Oh. St. 89.

New conditions may arise and new discoveries be made that will cause new conceptions of social needs and bring within the legislative power fields previously not occupied; but we frankly do not believe that there has been any such development of new conditions as necessitates or justifies the communal control of private property attempted by this ordinance, or by many others, some of which have been sustained by state courts. Restraints and restrictions upon alienation and use, even when imposed by covenant, are looked upon with disfavor and construed strictly in the interest of the free transfer and use of property. 7 R. C. L. 1115, citing *Hutchinson* v. *Ulrich*, 145 Ill. 335; *Hitz* v. *Flower*, 104 Oh. St. 47. Yet the theory of zoning, in its ampler definitions, assumes that the municipal councils will be able to do, comprehensively, what private owners, most interested, have found it difficult to do, even on a small scale.

That our cities should be made beautiful and orderly is, of course, in the highest degree desirable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well intended the control which it is sought to impose.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately three and one-half miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion, and Lake Shore Boulevard, through the northerly border in close proximity to the shore of Lake Erie. The Nickel Plate railroad lies from 1,500 to 1,800 feet north of Euclid Avenue, and the Lake Shore railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council, establishing a comprehensive zoning plan for regulating and restricting the location of trades,

industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theatres and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning and dyeing establishments,

blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesrooms; U-6 is further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4 or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1; and so on. In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories or thirty-five feet; in class H-2, to four stories or fifty feet; in class H-3, to eighty feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3

districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including restrictions and regulations as to the use of bill boards, sign boards and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family; and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.*

* The court below seemed to think that the frontage of this property on Euclid Avenue to a depth of 150 feet came under U-1 district and was available only for single family dwellings. An examination of the ordinance and subsequent amendments, and a comparison of their terms with the maps, shows very clearly, however, that this view was incorrect. Appellee's brief correctly interpreted the ordinance: "The northerly 500 feet thereof immediately adjacent to the right of way of the New York, Chicago & St. Louis Railroad Company under the original ordinance was classed as U-6 territory and the rest thereof as U-2 territory. By amendments to the ordinance a strip 630 [620] feet wide north of Euclid Avenue is classed as U-2 territory, a strip 130 feet wide next north as U-3 territory and the rest of the parcel to the Nickel Plate right of way as U-6 territory."

Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts. The plan is a complicated one and can be better understood by an inspection of the map, though it does not seem necessary to reproduce it for present purposes.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts. That part of the village lying south of Euclid Avenue is principally in U-1 districts. The lands lying north of Euclid Avenue and bordering on the long strip just described are included in U-1, U-2, U-3 and U-4 districts, principally in U-2.

The enforcement of the ordinance is entrusted to the inspector of buildings, under rules and regulations of the board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done. Penalties are prescribed for violations, and it is provided that the various

provisions are to be regarded as independent and the holding of any provision to be unconstitutional, void or ineffective shall not affect any of the others.

The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement. 297 Fed. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; that is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland

are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal, and reasonably to be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses. Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is neither alleged nor proved that there is, or may be, a demand for any part of appellee's land for any of the last named uses; and we cannot assume the existence of facts which would justify an injunction upon this record in respect of this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may, therefore, be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect of U–1 districts, since none of appellee's land falls within that class.

We proceed, then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter.

A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See *Terrace* v. *Thompson*, 263 U. S. 197, 215; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535.

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?"

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in

urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas,* which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining

the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis* v. *Bridgeman,* L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice* v. *New York,* 264 U. S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch* v. *Swasey,* 214 U. S. 91; *Hadacheck* v. *Los Angeles,* 239 U. S. 394; *Reinman* v. *Little Rock,* 237 U. S. 171; *Cusack Co.* v. *City of Chicago,* 242 U. S. 526, 529–530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Pierce Oil Corp.* v. *City of Hope,* 248 U. S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise

valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It can not be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204. Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to local-

ities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.

As sustaining the broader view, see *Opinion of the Justices,* 234 Mass. 597, 607; *Inspector of Buildings of Lowell* v. *Stoklosa,* 250 Mass. 52; *Spector* v. *Building Inspector of Milton,* 250 Mass. 63; *Brett* v. *Building Commissioner of Brookline,* 250 Mass. 73; *State* v. *City of New Orleans,* 154 La. 271, 282; *Lincoln Trust Co.* v. *Williams Bldg. Corp.,* 229 N. Y. 313; *City of Aurora* v. *Burns,* 319 Ill. 84, 93; *Deynzer* v. *City of Evanston,* 319 Ill. 226;

State ex rel. Beery v. *Houghton,* 164 Minn. 146; *State ex rel. Carter* v. *Harper,* 182 Wis. 148, 157–161; *Ware* v. *City of Wichita,* 113 Kan. 153; *Miller* v. *Board of Public Works,* 195 Cal. 477, 486–495; *City of Providence* v. *Stephens,* 133 Atl. 614.

For the contrary view, see *Goldman* v. *Crowther,* 147 Md. 282; *Ignaciunas* v. *Risley,* 98 N. J. L. 712; *Spann* v. *City of Dallas,* 111 Tex. 350.

As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare *State ex rel. Beery* v. *Houghton, supra,* sustaining the power, with *State ex rel. Lachtman* v. *Houghton,* 134 Minn. 226; *State ex rel. Roerig* v. *City of Minneapolis,* 136 Minn. 479; and *Vorlander* v. *Hokenson,* 145 Minn. 484, denying it, all of which are disapproved in the *Houghton* case (p. 151) last decided.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are—promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

The Supreme Court of Illinois, in *City of Aurora* v. *Burns, supra,* pp. 93–95, in sustaining a comprehensive building zone ordinance dividing the city into eight districts, including exclusive residential districts for one and two-family dwellings, churches, educational institutions and schools, said:

"The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. . . .

" . . . The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. . . . .

". . . The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers

which often inhere in unregulated municipal development."

The Supreme Court of Louisiana, in *State* v. *City of New Orleans, supra,* pp. 282–283, said:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. . . .

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. . . .

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circum-

stances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Cusack Co.* v. *City of Chicago, supra,* pp. 530-531; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 30–31.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not

made, it cannot be said that the land owner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. *Turpin* v. *Lemon*, 187 U. S. 51, 60. In *Railroad Commission Cases*, 116 U. S. 307, 335–337, this Court dealt with an analogous situation. There an act of the Mississippi legislature, regulating freight and passenger rates on intrastate railroads and creating a supervisory commission, was attacked as unconstitutional. The suit was brought to enjoin the commission from enforcing against the plaintiff railroad company any of its provisions. In an opinion delivered by Chief Justice Waite, this Court held that the chief purpose of the statute was to fix a maximum of charges and to regulate in some matters of a police nature the use of railroads in the state. After sustaining the constitutionality of the statute "in its general scope" this Court said: "Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company." Quoting with approval from the opinion of the Supreme Court of Mississippi it was further said: "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented." And finally: "When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations or conditions of the ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumer-

ated uses because of the general and broad restraint of the ordinance. What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER, dissent.

MICHIGAN *v.* WISCONSIN.

IN EQUITY.

No. 9, Original. Decree entered November 22, 1926.

Decree fixing boundary between Michigan and Wisconsin and dividing costs equally between the parties. [See opinion, 270 U. S. 295.]

Decree announced by MR. JUSTICE SUTHERLAND.

This cause having been heard and submitted upon certain questions, and the Court having considered the same and announced its conclusions in an opinion delivered March 1, 1926 (270 U. S. 295),

Now for the purpose of carrying the said opinion into effect, it is ordered, adjudged and decreed:

1. That the boundary between the States of Michigan and Wisconsin along the following course be and it is hereby fixed and finally established as follows:

From Lake Superior through the middle of the main channel of the Montreal River, to the headwaters thereof, as established in the survey of Captain Cram at the junction of the Pine River and Balsam Creek (also known as Lehman's Creek), thence along the line of the survey of William A. Burt of 1847, to the center of the channel between Middle and South Islands in the Lake of the Desert, thence continuing along the line of said survey to the shore of Lake Brulé, thence along the southerly shore of Lake Brulé to the center of the main channel of the River Brulé, thence down the center of the main channel of the rivers Brulé and Menominee, to the center of the harbor entrance of said Menominee River, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of Green Island and westerly

of Chambers Island and through the Rock Island Passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee River piers, thence east by south, seven and one-half miles to the center of the most usual ship channel of the Green Bay, thence along said ship channel north by east one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north to the boundary between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan. Provided, that the section of the boundary in the Brulé and Menominee rivers shall follow the main channel thereof, except that where islands occur in the Brulé River or in the Menominee River, down to and inclusive of the Quinnesec Falls, extending to the line between sections 5 and 6, Township 38 north, of Range 20 east, of the Wisconsin Public Survey, extended across said river, the line shall pass through the channel nearest the Wisconsin bank, so as to throw all such islands into Michigan; and where islands occur in the Menominee River below the Quinnesec Falls, the line shall pass through the channel nearest the Michigan bank, so as to throw all such islands into Wisconsin. Provided further, that the land known as "Merryman's Island," being surveyed as part of sections 20 and 29, Township 36 north, of Range 28 west, of the Michigan Public Survey, and the land known as "Sugar Island," being a part of lots 1 and 2, Section 11, lot 6 of Section 2, and lot 1 of Section 3, Township 31 north, of Range 27 west, of the Michigan Public Survey, is determined to be part of the mainland of Michigan.

The costs of this proceeding in this Court shall be divided equally between the parties.

McCARDLE ET AL. *v.* INDIANAPOLIS WATER COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR INDIANA.

No. 37. Argued April 16, 19, 1926.—Decided November 22, 1926.

1. In determining the present value of the property of a public utility for rate-making purposes, consideration must be given to prices and wages prevailing at the time of the investigation; and, in the light of all the circumstances, there must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future. P. 408.
2. In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future. P. 408.
3. It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase. P. 410.
4. The weight to be given to the original and present costs of construction, and other items or classes of evidence, is to be determined in the light of the facts of the case in hand. P. 410.
5. In this case prices and values have so greatly changed that the amount paid for land in the early years of the enterprise and the cost of plant elements constructed prior to the great rise of prices due to the war do not constitute any real indication of their value at the present time. P. 410.
6. The reasonable cost of a system of waterworks, well planned and efficient for the public service, is good evidence of its value at the time of construction. And such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices. P. 411.
7. If the tendency or trend of prices is not definitely upward or downward and it does not appear probable that there will be a substantial change of prices, then the present value of lands plus

the present cost of constructing the plant, less depreciation, if any, is a fair measure of the value of the physical elements of the property. P. 411.

8. The validity of rates fixed for a public utility depends on property value as of the effective date of the order and for a reasonable time thereafter. P. 411.
9. While the values of such properties do not vary with frequent minor fluctuations in the prices of material and labor required to produce them, they are affected by and generally follow the relatively permanent levels and trends of such prices. P. 411.
10. Judicial notice taken of the facts that, since the end of the year 1923, there has been no general decline in the prices of labor and materials; and that the trend has been upward rather than downward. P. 412.
11. In valuing the property of a water works company for rate-making, the value of its water rights, should be included, and likewise the "going concern value" of the plant. P. 413.
12. In determining what shall be deducted for depreciation, the testimony of competent valuation engineers who examined the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities. P. 416.
13. The plant to be valued is the plant used to give the service and not the estimated cost of a different plant. Save under exceptional circumstances, the court is not required to enter into a comparison of the merits of different systems. P. 417.
14. Evidence *held* more than sufficient to sustain 7% as a reasonable rate of return for a water company. P. 419.
15. Rates of yield on investments in bonds plus brokerage are substantially less than the rate of return required to constitute just compensation for the use of properties in the public service. P. 419.
16. In a suit like this the District Court should make specific findings as to value, reasonable rate of return, and net earnings. P. 420.
17. But to avoid prolonging such a litigation this Court may determine whether the facts in the record justify the conclusion below, rather than remand for further findings. P. 420.

Affirmed.

APPEAL by the members of the Public Service Commission of Indiana and the City of Indianapolis from a decree

of the District Court, entered without opinion, enjoining enforcement of the Commission's order fixing the rates of the Water Company.

Messrs. Arthur L. Gilliom, Attorney General of Indiana, and *Taylor E. Groninger,* with whom *Messrs. Edward M. White,* Assistant Attorney General, *James M. Ogden,* and *Clair McTurnan* were on the brief, for appellants.

Mr. William L. Ransom, with whom *Messrs. Albert Baker, Joseph J. Daniels,* and *W. A. McInerny* were on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

June 8, 1923, the water company filed with the commission its petition in which it stated that its rates were too low and proposed a higher schedule. The city of Indianapolis answered, alleging that the rates in force were adequate. After hearing the parties, the commission found that, as of May 31, 1923, the value of the property used was not less than $15,260,400; that the annual return under existing rates would be approximately $800,000; that seven per cent. was a reasonable rate of return; that the rates in force were insufficient and that those proposed would be exorbitant and discriminatory. And the commission made an order, effective January 1, 1924, prescribing a schedule increasing some of the rates. In its report it stated that the rates authorized might not produce a seven per cent. return for the immediate future; but it expressed belief that on the average over a period of approximately three years the schedule would produce an adequate return.

This suit was brought by the company against the members of the commission to enjoin the enforcement of that order on the ground that the rates prescribed are confiscatory. The members of the commission answered. The

city intervened and answered. There was involved the value of the property used, probable earnings, operating expenses, and the amount required to constitute just compensation safeguarded by the Fourteenth Amendment.

The decree states that the court, in an opinion given orally, sustained as proved the material averments of the complaint, and held that the amount as found by the commission was less than the fair value of the property as of January 1, 1924, by more than $3,500,000, and that "the fair value of complainant's said property at said time was and is not less than $19,000,000, and that the water rates imposed in that order . . . are too low and are confiscatory of complainant's said property"; and it enjoins the enforcement of the order. The members of the commission and the city appeal jointly. § 238, Judicial Code.

Appellants contend that the court adopted as the measure of value the cost of reproduction new less depreciation, estimated on the basis of spot prices as of January 1, 1924, or gave that figure controlling weight. The appellee says that the cost of reproduction less depreciation, estimated at such prices, was shown to be more than $22,500,000, and that the court did not adopt such costs as a measure or give them undue weight as evidence of value.

The record contains three reports of the commission dealing with valuations of the company's property. In Case No. 1400, the commission, March 15, 1917, reported that, as of January 1, 1917, the value of the company's property used in the public service was not less than $9,500,000. In Case No. 6613, the commission, January 2, 1923, reported that as of December 31, 1921, the valuation of the company's operative and nonoperative property was $16,455,000. In case No. 7080, the commission, November 28, 1923, made the order attacked in this suit. It reported that as of May 31, 1923, the value of the company's operative property was not less than $15,260,400.

In No. 1400, the commission stated: The accounting of complainant and its predecessor was defective in that there was not a careful division of expenditures between capital account and operating expenses. The plant account of the predecessor company owning and operating the plant from 1869 to 1881 was $1,574,840.04, but it expended more than $200,000 that is not included in that figure. According to complainant's books it expended between April 23, 1881 and January 1, 1917 for construction, $6,112,320.86. The amount of moneys actually invested in the plant exceeded $8,000,000; and real estate value had appreciated more than $1,500,000. The commission did not definitely state the original cost of construction or the total expenditures for permanent improvements. It found the cost of reproduction new—including $328,000 for going value and $75,000 for working capital—to be $10,406,431, and that less depreciation $9,670,191. The estimate was based on prewar prices—those prevailing in 1916 and prior years. It reported that the property could not be duplicated "to-day [January 1, 1917] for less than $12,500,000." This figure covered only the physical operative property. Nevertheless the commission fixed the "value of all the property . . . that is used and useful for the convenience of the public at not less than $9,500,000." This is the sum of $8,000,000, stated as the minimum amount of money expended to produce the plant, and $1,500,000, the increase in the value of the company's land. It is apparent that the enhancement in the value of the plant other than land was not taken into account, and that nothing was included for cash working capital, or intangible elements of value.

In Case No. 6613, the commission reported that between January 1, 1917, and November 31, 1922, capital additions amounted to $1,639,146, which added to $12,500,000, cost of duplication (as reported in Case No. 1400) made $14,139,146. It said the company "would

be entitled to have added to this sum reasonable allowances for working cash, going value, water rights, and such other elements as may not have been included in the original figure and also the value of the non-operative property which apparently was not included in the original figure. The value on this basis would exceed $16,000,000 for the whole property without giving any consideration to the enormous enhancement of value of all good property in Indianapolis which has occurred since January 1, 1917." And the commission set out a number of estimates based on different price levels, made by its own engineering staff of which Mr. Earl L. Carter was the head. There is shown, as to physical property only, the cost of reproduction less depreciation estimated on different price bases. Some of these estimates were on quoted market prices of cast iron pipe and some were on prices approximately ten per cent. less. This made a difference of about $375,000. The estimates on the lower basis follow:

Average prices	10 years ending with 1920.....	$13,979,744
	10 years ending with 1921.....	14,689,078
	10 years ending with 1922.....	15,232,676
	5 years ending with 1922.....	18,335,974
	Prices prevailing October 1, 1922.....	17,328,249

These include $102,997 to cover materials and supplies.

The company submitted various estimates made by valuation engineers Hagenah and Erickson. There is shown below, in respect of physical property only, cost of reproduction less depreciation.

Average prices	10 years ending with 1920.....	$16,020,456
	5 years ending with 1921.....	20,535,543
	Prices prevailing October 1, 1922.....	19,447,193

There were added for materials and supplies $100,000, for working capital $135,000, for water rights $500,000, and for going value $2,000,000.

The company also submitted estimates and appraisals made by valuation engineers, Sanderson and Porter.

They estimated cost of reproduction of the "bare physical property" on prices as of October 1, 1922, at $19,087,560, and on average of prices for ten years ending with 1920, at $16,169.257. Neither of these included anything on account of working capital, water rights or going value. To cover working capital $267,312 was added and for water rights and going value $2,355,050.

By its order the commission fixed the value of the property at $16,455,000. Its report shows that figure to have been made up as follows:

Commission's engineering staff's appraisal, cost of reproduction less depreciation, on basis of average level of labor and material prices for the 10-year period ending December 31, 1921, including materials and supplies	$14,689,000 [1]
Capital additions from April 1, 1922 to October 31, 1922, at actual cost	215,000
Total physical property	$14,904,000
Going value and water rights, 9½%	1,416,000
	$16,320,000
Working cash capital	135,000
Total value	$16,455,000

In case No. 7080, the commission's valuation of the company's properties used in the public service, as of May 31, 1923, is $1,194,600 less than the amount found by the commission to be the value of all its property—operative and non-operative, as of October 1, 1922. The total of working capital, water rights and going value was reduced $571,000, and the value of the tangible property $623,600.

[1] This includes $648,921 estimated by Mr. Carter to cover items of property classified by him as non-operative. Mr. Metcalf, consulting engineer for the company, finds $68,000 to be the value of the items he classifies as non-useful. And Mr. Hagenah so classifies items to which he assigns $119,000.

At the trial in the lower court, the company introduced estimates of the cost of reproduction less depreciation, made by Hagenah and Erickson, as follows:

Prices prevailing December 31, 1923		$22,669,026
Average prices	5 years ending with 1923	22,652,799
	3 years ending with 1923	21,625,358
	10 years ending with 1923	19,624,354

To each of these were added $235,000 to cover working capital, consisting of materials, supplies and cash, $500,000 for water rights, and $2,000,000 for going value.

And the company also introduced similar estimates by Sanderson and Porter, as follows:

Prices prevailing December 31, 1923		$21,898,662
Average prices	5 years ending with 1923	21,863,858
	3 years ending with 1923	20,968,127
	10 years ending with 1923	18,931,979

To each of these were added $361,245 to cover working capital (consisting of materials and supplies $127,939, being the average amount on hand in 1923, and $233,306 cash, being one-eighth of one year's gross earnings), $500,000 for water rights, and $2,098,000, going value.

Mr. Carter testified that his estimate, $14,689,078, adopted by the commission in No. 6613, was based on average prices in the ten years ending with 1921, on the inventory as of April 1, 1922. He said that, based on average prices in ten years ending with 1923, the cost of reproduction less depreciation was $16,006, 370, and that between April 1, 1922 and December 31, 1923 there had been made net additions amounting to $1,010,105, making a total in round figures of $17,000,000. And he also testified that on the basis of prices prevailing January 1, 1924, the cost of reproduction less depreciation was $19,500,000. All his estimates covered fixed physical property, material and supplies, but include nothing for cash working capital, water rights or going value.

The commission's report in No. 6613 highly commends the estimates made by its chief engineer and his assistants. It states that the valuation engineers employed by the company are firms of national reputation and unquestioned standing, and that the difference between appraisals made by its own staff and those presented for the company are due to differences of opinion as to the "application of the cost of reproduction theory to the ten-year period prices," details of the work necessary to construct the property, amount to be included for structural overheads, and the condition of certain items of the property. It says that these differences have been analyzed and explained by the parties, and that further analysis and careful weighing of the evidence would be likely to lead to a compromise figure between the two extremes. "However that may be, the Commission is inclined to accept the report of its staff as a basis of value believing it to be conservative and accurate. Considering all the facts, including all the appraisals and the other evidence concerning the trend of prices, the Commission is of the opinion that in this case the average of prices for the ten-year period ending with 1921, the last full ten years available, most nearly represents the fair value of petitioner's physical property."

But in determining present value, consideration must be given to prices and wages prevailing at the time of the investigation; and, in the light of all the circumstances, there must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future. In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property at the

time of the investigation and for a reasonable time in the immediate future. *S. W. Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S. 276, 287, 288; *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 692. Cf. *Board of Utility Commissioners* v. *New York Telephone Co.*, 271 U. S. 23, 31.

The commission further said: "If it were known that the present price level would continue indefinitely in the future and that the purchasing power of the dollar would remain the same, then the cost of reproduction at the time of the inquiry would be the true measure of value. . . . It is likely that there will be some reduction from the present price level. . . . The value is being fixed not for today, but for a reasonable period in the future. Consequently, the reasonableness of the use of average prices is apparent. It is extremely doubtful if at any time within the next ten years prices will be as low as the prices used [those in the 10 years ending with 1921] . . . and it is equally certain that the average prices for the next, say, five years will be at least as high as the ten-year average used in this valuation. . . . The iron and steel industries are enjoying greatly increased business and a general increase of about twenty per cent. in wages has been made. The increase in the wage scale has been reflected in the increased cost of iron pipe and other material. There seems to be no prospect of lower prices for such products. However much we may deplore the situation, the fact is that prices are on a permanently high level as compared with prewar times and there is no likelihood whatever that a price level anywhere near approximating the low level of prewar times will prevail for many years in the future." The commission pointed out that enhancement of value "may occur, first, when there is no change in the purchasing power of the dollar by reason of various circumstances, such as the natural increment of land values in a growing city, and, second, by a decrease in the purchasing power or value of the dollar." And it added, "Both factors affect this property."

In explanation of the price levels used, the commission said, "By adopting the appraisal [the estimate of cost of reproduction less depreciation made by its own staff] on the basis of the average prices of labor and material for the ten-year period ending with 1921, the Commission recognizes the influence of the original cost factor. It is believed that the fair original cost of the physical property was from 12 to 20 per cent. less than the $14,904,000 used as a basis herein. On the other hand, the evidence shows that the cost of reproducing the physical property today would be from $4,500,000 to $5,000,000, or from 30 to 35 per cent. more than the said sum of $14,904,000. . . . There is no doubt that the element of original cost has been recognized sufficiently. There is doubt as to whether or not the element of the cost of reproduction new today has been given sufficient weight."

It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase. The decision of this court in *Smyth* v. *Ames*, 169 U. S. 466, 547, declares that to ascertain value "the present as compared with the original cost of construction" are, among other things, matters for consideration. But this does not mean that the original cost or the present cost or some figure arbitrarily chosen between these two is to be taken as the measure. The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand. By far the greater part of the company's land and plant was acquired and constructed long before the war. The present value of the land is much greater than its cost; and the present cost of construction of those parts of the plant is much more than their reasonable original cost. In fact, prices and values have so changed that the amount paid for land in the early years of the enterprise and the cost of plant elements constructed prior to the great rise of prices due to

the war do not constitute any real indication of their value at the present time. *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 157; *Georgia Ry.* v. *R. R. Comm.*, 262 U. S. 625, 630–631; *Bluefield Co.* v. *Pub. Serv. Comm.*, *supra*, 691–692; *S. W. Tel. Co.* v. *Pub. Serv. Comm.*, *supra*, 287. Undoubtedly, the reasonable cost of a system of waterworks, well-planned and efficient for the public service, is good evidence of its value at the time of construction. And such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices. And, as indicated by the report of the commission, it is true that, if the tendency or trend of prices is not definitely upward or downward and it does not appear probable that there will be a substantial change of prices, then the present value of lands plus the present cost of constructing the plant, less depreciation, if any, is a fair measure of the value of the physical elements of the property. The validity of the rates in question depends on property value January 1, 1924, and for a reasonable time following. While the values of such properties do not vary with frequent minor fluctuations in the prices of material and labor required to produce them, they are affected by and generally follow the relatively permanent levels and trends of such prices. The fact that original cost was probably 12 to 20 per cent. less than the estimate of the commission's engineer based on the average of prices for the ten years ending with 1921—two years before the rate order became effective—does not tend to support the commission's adoption of that estimate. The cost of reproduction on price levels prevailing January 2, 1923 was found to be 30 to 35 per cent. or from $4,500,000 to $5,000,000 more. The average of prices in the ten years ending with 1923—the effective date of the rate order—was shown by the testimony of the commission's chief engineer to produce a result nearly 14 per cent. higher than the figure adopted;

and, on the basis of prices prevailing on the effective date of the order, cost of reproduction less depreciation would be about 32 per cent. higher than that taken by the commission. The high level of prices and wages prevailing in 1922 and 1923 should be taken into account in finding value as of January 1, 1924 and in the years immediately following. Moreover, there is nothing in the record to indicate that the prices prevailing at the effective date of the rate order were likely to decline within a reasonable time—one, two or three years—to the level of the average in the ten years ending with 1923. And we may take judicial notice of the fact that there has been no substantial general decline in the prices of labor and materials since that time. The trend has been upward rather than downward. The price level adopted by the commission—the average for ten years ending with 1921—was too low. And it is clear that a level of prices higher than the average prevailing in the ten years ending with 1923 should be taken as the measure of value of the structural elements on and following the effective date of the rate order complained of.

For working capital, the commission's chief engineer included $102,997 to cover materials and supplies. He did not include anything to cover cash working capital. The commission adopted his total and added $135,000 for cash, making $237,997 in all. The testimony of the company's witnesses supports a higher figure, and there was no other evidence on the subject. The amount is low when compared with those included in other cases.[2]

[2] *New York & Queens Gas. Co.* v. *Newton*, 269 Fed. 277, 284; *New York & Queens Gas Co.* v. *Prendergast*, 1 F. (2d) 351, 363; *Brooklyn Union Gas Co.* v. *Nixon* 2 F. (2d) 118; *Kings County Lighting Co.* v. *Prendergast*, 7 F. (2d) 192, 201, 217; *New York & Richmond Gas. Co.* v. *Prendergast*, 10 F. (2d) 167, 209, 210; *Bronx Gas & Electric Co.* v. *Public Service Commission*, 28 N. Y. State Dept. Rep. 329, 364 (aff'd 208 App. Div. 780).

The commission in No. 6613 discussed the company's water rights. It said: "Petitioner has acquired and now owns the right or privilege of taking and using all the water in White River and Fall Creek for the purposes incident to its business. This right is an extraordinarily valuable part of the whole value of this property. The right to use the water of White River has saved the water company and likewise the citizens of Indianapolis millions of dollars over what it would have cost to secure sufficient water for the needs of the city in any other possible way. . . . The water company is entitled to share in the benefit of this valuable possession by reason of the fact that by its foresight, ingenuity, and initiative it has taken this stream of uncertain flow of impure water and has converted it into an immense asset both to itself and to the public. . . . This whole plant . . . has been planned and constructed with an ingenuity and economy and foresight for the future needs of the city that is unequalled under any similar circumstances anywhere in the country. Indianapolis is probably the most unfortunately situated of any large city so far as the natural available water is concerned, yet the possibilities of an insignificant stream flowing through a thickly populated countryside have been so thoroughly developed that Indianapolis now has, and if it doubles in population will have, an ample supply of potent [potable] water at a cost much below the cost in many other cities more favorably located. This development of its water rights, which has been accomplished by the water company at times with extreme difficulty, does actually largely increase the value of the property."

The value of these water rights must be included. *San Joaquin Co.* v. *Stanislaus County*, 233 U. S. 454, 459.

The report further stated: "A good property has an intangible value or going concern value over and above the value of the component parts of the physical property.

. . . Any reasonable man with a knowledge of this property and the local conditions would unhesitatingly affirm that it had a value far in excess of the value of the pipe, buildings, grounds and machinery. Consider its earning power with low rates, the business it has attached, its fine public relations, its credit, the nature of the city and the certainty of large future growth, the way the property is planned and is being extended with the future needs of the city in view, its operating efficiency and standard of maintenance, its desirability as compared with similar properties in other cities and with other utilities of comparable size in this city. These things make up an element of value that is actual and not speculative. It would be considered by a buyer or seller of the property or by a buyer or seller of its securities."

The decisions of this court declare: "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use." *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 165; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 191, 192. And see *National Waterworks Co.* v. *Kansas City*, 62 Fed. 853, 865; *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202, 203, and cases cited.

The commission January 2, 1923 in No. 6613 included $1,416,000, being 9.5 per cent. of the amount attributed to the physical elements, to cover water rights and going value. November 28, 1923 in No. 7080, it included only $980,000 to cover working capital, water rights and going value. There is no specification of the amount assigned to each. It stated that the amount was a smaller percentage of the value of the physical property than is

usually allowed in such cases. There is nothing in the record to justify the reduction. Deducting $135,000 for cash working capital, the amount included for water rights and going value is less than six per cent. of the value of the physical elements as fixed by it. Having regard to the character of the system, that amount is clearly too low. The valuation engineers called by the company appraised water rights and going value separately. Each fixed the value of water rights at $50,000, and one put going value at $2,000,000 and the other at a slightly higher figure. The commission's engineer made no appraisal of water rights or going value. The evidence is more than sufficient to sustain 9.5 per cent. for going value. And the reported cases showing amounts generally included by commissions and courts to cover intangible elements of value indicate that ten per cent. of the value of the physical elements would be low when the impressive facts reported by the commission in this case are taken into account.[3]

The commission and the city submit the same brief. Some of their contentions are opposed to the commission's findings above referred to. They support an estimate or appraisal made by Walter S. Bemis, an engineer

[3] *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 184; *Bluefield Co.* v. *Pub. Serv. Com.*, 262 U. S. 679, 686; *Streator Aqueduct Co.* v. *Smith*, 295 Fed. 385, 390; *Westinghouse Electric Co.* v. *Denver Tramway Co.*, 3 F. (2d) 285, 298; *Southern Bell Tel. & Tel. Co.* v. *Railroad Commission*, 5 F. (2d) 77, 87; *Consolidated Gas Co. of N. Y.* v. *Prendergast*, 6 F. (2d) 243, 259; *Kings County Lighting Co.* v. *Prendergast*, 7 F. (2d) 192, 217; *Citizens Gas Co.* v. *Public Service Commission*, 8 F. (2d) 632; *New York & Richmond Gas Co.* v. *Prendergast*, 10 F. (2d) 167, 208, 210; *Pioneer Telephone Co.* v. *Westenhaver*, 29 Okla. 429, 448; *Public Service Co.* v. *Public Utility Bd.*, 84 N. J. L. 463, 479; *Oshkosh Water Works Co.* v. *Railroad Commission*, 161 Wis. 122, 129, 131; (cf. *Appleton Water Works* v. *Railroad Commission*, 154 Wis. 121); *Northern Pacific Ry. Co.* v. *State*, 84 Wash. 510; *State* v. *Telephone Co.*, 115 Kans. 236, 241, 261.

called by the city. He reported that, as of December 31, 1923, the cost of reproduction new was $12,216,508.05 and that less depreciation $9,220,214.18. The estimate is based on "ten year average prices from 1911 to 1920." It gives no consideration to the prices prevailing in the three years preceding the effective date of the order. The price basis is substantially lower than the average for ten years ending 1923. There is deducted approximately 25 per cent. of estimated cost new to cover accrued depreciation. The deduction was not based on an inspection of the property. It was the result of a "straight line" calculation based on age and the estimated or assumed useful life of perishable elements. The commission's report indicates that the property is well-planned, well-maintained and efficient. Its chief engineer inspected it, and estimated its condition by giving effect to results of the examination and to the age of the property. He deducted about six per cent. to cover depreciation. Mr. Hagenah made an estimate of existing depreciation based on actual inspection and a consideration of the probable future life as indicated by the conditions found. He deducted less than six per cent. Mr. Elmes testified that he made an inspection and estimate of all the actual depreciation. He estimated $443,044 would be required to restore the property as of appraisal date to its condition when first installed and put in practical operation. He deducted that amount. The testimony of competent valuation engineers who examined the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities. The deduction made in the city's estimate cannot be approved. *Pacific Gas Co.* v. *San Francisco*, 265 U. S. 403, 406; *Standard Oil Co.* v. *So. Pacific Co.*, *supra*, 159; *Landon* v. *Court of Industrial Relations*, 269 Fed. 433, 445; *City of Winona* v. *Wisconsin-Minnesota Light & P. Co.*, 276 Fed. 996, 1004; *New York Telephone*

Co. v. *Prendergast,* 300 Fed. 822, 826; *Southern Bell Tel. & Tel. Co.* v. *Railroad Commission,* 5 F. (2d) 77, 95.

The company owns a canal in which water flows from the river to filter beds and to a power plant below them, where that not taken for filtration is used to pump water into the mains for distribution. The estimate of Mr. Bemis for the city eliminates the lower part of the canal and suggests the substitution of a steam plant. This reduces cost of reproduction new by $1,073,539.63 and that less depreciation by $785,013.11. The whole canal was included in the estimate of Mr. Carter which was adopted. The commission in its report in No. 7080 described the canal and the uses to which it is put including the production of power for pumping, and said: "This shows the work of a competent construction engineer." And in No. 6613, the commission said: "The canal appears to have been perfectly adapted to become a part of the water plant of the city. It intercepts the waters of White River near Broad Ripple. This is so far upstream that the source of supply has been free from the contamination arising from densely settled districts of the city for nearly half a century. . . . It saves the lift of millions of gallons of water daily from White River to the level of the filter beds. . . . The economic value of the canal is very large, when regard is given to the savings it effects, and the revenue it produces . . . Its great value lies in the fact that it has never failed to do efficiently the work that must be done by some instrumentality of the water plant. The cost of a steel or concrete main or conduit, that would carry a far less quantity of water, would exceed the cost of reconstruction of the canal, and its structural parts. The entire canal property is used and useful in the performance of the service this utility was created to perform."

There is to be ascertained the value of the plant used to give the service and not the estimated cost of a different

plant. Save under exceptional circumstances, the court is not required to enter upon a comparison of the merits of different systems. Such an inquiry would lead to collateral issues and investigations having only remote bearing on the fact to be found, viz. the value of the property devoted to the service of the public.

The estimate made for the city is not useful as a guide for ascertainment of value of the company's property for 1924.

For convenient comparison, there follows a statement of the estimates based on prices prevailing January 1, 1924 and those based on average prices in the ten years ending with 1923.

	Spot prices	*Average prices*
Carter	$19,500,000	$17,000,000
Hagenah and Erickson	22,669,000	19,624,000
Sanderson and Porter	21,898,000	18,931,000

While some expressions of the district judge indicate that he was of opinion that dominant or controlling weight should be given to cost of reproduction less depreciation estimated on spot prices as of January 1, 1924, it is clear that the $19,000,000 fixed by him as the minimum value could not have been arrived at on that basis. The commission's chief engineer testified that his estimate on prices as of that date was $19,500,000. This was exclusive of cash working capital, water rights and going value for which Hagenah and Erickson included $2,735,000 and Sanderson and Porter $2,961,245. But the commission in No. 6613 added $135,000 for such working capital. It also added 9.5 per cent. of the value of the physical elements to cover water rights and going value, amounting to $1,416,000. If only these additions be made to Mr. Carter's spot price estimate, there is produced $21,051,000. And, if 9.5 per cent. of $19,500,000 were taken to cover water rights and going value, the total would exceed $21,487,000. Moreover, the estimates on the basis of

spot prices introduced by the company are considerably higher than Mr. Carter's figure.

The commission, November 28, 1923, in No. 7080 found seven per cent. to be a reasonable rate of return. It stated that was the rate the city's appraiser, Mr. E. W. Bemis, testified to be reasonable. At the trial, the company introduced testimony supporting higher rates. Mr. Hagenah and Mr. Elmes testified that eight per cent. was a reasonable rate of return. Mr. Metcalf, consulting engineer for the company, supported a rate from 7.5 per cent. to eight per cent. Appellants offered a study by Mr. E. W. Bemis of the rates of yield to investors on certain public utility bonds. He took into account 524 flotations put out at different times between July, 1921, and February, 1924, inclusive. The average yield in the last six months of 1921 was 7.33 per cent. and in February, 1924, 6.11 per cent. The trend was not downward throughout the whole period. It was upward from the last half of 1922 through all of 1923. And he testified that there should be added .4 of one per cent. to cover brokerage. It is obvious that rates of yield on investments in bonds plus brokerage are substantially less than the rate of return required to constitute just compensation for the use of properties in the public service. Bonds rarely constitute the source of all the money required to finance public utilities. And investors insist on higher yields on stock than current rates of interest on bonds. Obviously, the cost of money to finance the whole enterprise is not measured by interest rates plus brokerage on bonds floated for only a part of the investment. The evidence is more than sufficient to sustain the rate of seven per cent. found by the commission. And recent decisions support a higher rate of return.[4]

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[4] *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 268; *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, 400; *Bluefield Co.* v. *Pub. Serv. Com.* 262 U. S. 679, 692, *et seq.*; *Landon* v. *Court of Industrial*

There was controversy as to probable net earnings for 1924. The company's estimate is $958,000; the city's $1,121,550.19. The principal difference arises from the city's contention that the company's estimate of revenue was too low by $67,758.92 and of operating expenses was too high by $95,791.27.

While the facts stated in the court's decision are sufficient to sustain the decree, the findings as to value, the reasonable rate of return, and the net earnings are not as specific as good practice requires. As the litigation would be prolonged considerably if the case were remanded for further findings, we have examined the record to determine whether the facts proved justify the court's conclusion. *Knoxville* v. *Water Co.*, 212 U. S. 1, 8; *Chicago, M. & St. P. Ry.* v. *Tompkins*, 176 U. S. 167, 179; *Lincoln Gas Co.* v. *Lincoln*, 223 U. S. 349, 361; *Denver* v. *Denver Union Water Co., supra*, 182; *Cole* v. *Ralph*, 252 U. S. 286, 290.

And we are satisfied that the decree is right. As indicated above, a reasonable rate of return is not less than seven per cent. In his decision the district judge plainly intimated that he was of opinion that probable net earnings for 1924 were not sufficient to pay more than five per cent. on $19,000,000. The amount of net earnings in 1924, as estimated by appellants, is only sufficient to pay seven per cent. on $16,022,145. The evidence requires a finding that, exclusive of the items classified by Mr. Carter as non-operative, the value of the property is much more than that amount. It is shown that, if due consideration be given to the price level and trend prevailing

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Relations, 269 Fed. 433, 445; *Minneapolis* v. *Rand*, 285 Fed. 818, 830; *Mobile Gas Co.* v. *Patterson*, 293 Fed. 208, 221; *Southwestern Bell Telephone Co.* v. *City of Fort Smith*, 294 Fed. 102, 108; *New York Telephone Co.* v. *Prendergast*, 300 Fed. 822, 826; *Southern Bell Tel. & Tel. Co.* v. *Railroad Commission*, 5 F. (2d) 77, 89; *Brooklyn Union Gas. Co.* v. *Prendergast*, 7 F. (2d) 628, 672

in the years immediately before and those probable during a reasonable time following the effective date of the order, January 1, 1924, the $17,000,000 estimated by Mr. Carter on the basis of average prices in the ten years ending with 1923 is substantially less than the amount fairly attributable to the physical elements of the property. The evidence sustains an amount in excess of ten per cent. to cover water rights and going value and also $135,000 for cash working capital. On a consideration of the evidence, it is held that the value of the property as of January 1, 1924 and immediately following was not less than $19,000,000.

Decree affirmed.

MR. JUSTICE HOLMES concurs in the result.

MR. JUSTICE BRANDEIS, dissenting.

In the case at bar, as in *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, and *Georgia Railway & Power Co.* v. *Railroad Commission,* 262 U. S. 625, both the rate-making body and the lower court purported to adopt the rule of *Smyth* v. *Ames,* 169 U. S. 466, by which the value of the property, as of the time of the rate hearing, is taken as the rate base. Hence, the soundness of that rule—the question on which this Court divided in *Missouri ex rel. Southwestern Bell Telephone* v. *Public Service Commission,* 262 U. S. 276, and in *Pacific Gas & Electric Co.* v. *San Francisco,* 265 U. S. 403—is not involved here. Nor is the general question involved on which the Court divided in *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 297.

The Commission and the lower court likewise agreed that reproduction cost was evidence as to value. The primary questions on which they differed are these. Is a finding of reproduction cost tantamount to a finding of value? Is the reproduction cost which should be ascertained by the tribunal, the "spot" reproduction cost—that is, cost at prices prevailing at the time of the hearing?

The District Court, as I read its opinion, answered both of these questions in the affirmative.[1] The learned judge assumed that spot reproduction cost is the legal equivalent of value. He found that $19,000,000 was, on the evidence, the lowest conceivable spot reproduction cost. He assumed that, since the utility was willing to accept this minimum as reproduction cost, no amount less than that could be found by him to be the value, or rate base. He believed that recent decisions of this Court required him so to hold. In this belief he was clearly in error.

That reproduction cost is not conclusive evidence of value has been repeatedly stated by a unanimous Court. The rule of *Smyth* v. *Ames,* 169 U. S. 466, 547, requires not only that each class of other evidence of value be considered, but also that each class of evidence "be given such weight as may be just and right in each case."

[1] "Granting that these cases [*Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission,* 262 U. S. 276; *Bluefield Water Works* v. *Public Service Commission,* 262 U. S. 679; *Georgia Ry. & Power Co.* v. *Railroad Commission,* 262 U. S. 625] were decided at a time when the Court had, as a matter of history in this particular field of jurisprudence, full cognizance of the probative character and the propriety of considering evidence such as is popularly called evidence of historical cost, evidence of reproduction cost upon a certain price level, evidence of value which is called prudent investment value, and, fourth, evidence of what is strictly and technically reproduction spot depreciated at the time of the inquiry; these cases press upon us sharply the query of why these cases, in their results, disclose the emphasis given to the last named of these four character[s] of evidence; and I am entirely content to accept the characterization made by the Judges in the Sixth Circuit in the so-called Monroe Gas case; that the necessary implication from their results is that dominating consideration should be given to evidence of reproduction value and, if that means anything, it means that evidence of reproduction value spot at the time of the inquiry must be considered as evidence of a primarily different character from either of the other three kinds of evidence. . . . Now, the Court is required, as it seems to me, to apply the principles that are to be discussed and to be accepted, as I indicated in my preliminary remarks, as to what the Supreme Court meant

Similarly, it was stated in the *Georgia Railway & Power* case, 262 U. S. 625, 630:

"The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct. As was said in *Minnesota Rate Cases*, 230 U. S. 352, 434: 'The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.'"

There is, so far as I recall, no statement by this Court that value is tantamount to reproduction cost.

Nor do I find in the decisions of this Court any support for the view that a peculiar sanction attaches to "spot" reproduction cost, as distinguished from the amount that it would actually cost to reproduce the plant if that task were undertaken at the date of the hearing. "Spot" reproduction would be impossible of accomplishment with-

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by what it said in these three cases. Is it possible . . . or can the Court now rationally say that the Commission here and, in order to test it out, include the Court here, can, by any sort of examination of the evidence, reach a conclusion that upon unimpeached evidence showing a minimum of spot reproduction values at $19,000,000, it will still find reasonable value at $15,260,000? . . . Now, that brings us to the evidence in this case and, as I said, can the Commission or can this Court now, say that there can be a rational reconcilement between unimpeached evidence of $19,000,000, as a minimum cost reproduction value spot, and any other price level, particularly one showing a disparity of five million dollars—four or five? . . . I am not confronted with the problem of fixing a valuation within the range of dispute upon spot reproduction. I say I am not confronted with that problem, because the complainant comes into this Court and offers to accept $19,000,000, as a fair basis of valuation, even though, as it says, and I think has reason to say and could support it, it could, upon the record, sustain a higher valuation." The decree itself recited "that the fair value of complainants' said property was and is not less than $19,000,000."

out the aid of Aladdin's lamp. The actual cost of a plant may conceivably indicate its actual value at the time of completion or at some time thereafter. Estimates of cost may conceivably approximate what the cost of reproduction would be at a given time. But where a plant would require years for completion, the estimate would be necessarily delusive if it were based on "spot" prices of labor, materials and money. The estimate, to be in any way worthy of trust, must be based on a consideration of the varying costs of labor, materials, and money for a period at least as long as would be required to construct the plant and put it into operation. Moreover, the estimate must be made in the light of a longer experience and with due allowances for the hazards which attend all prophesies in respect to prices. The search for value can hardly be aided by a hypothetical estimate of the cost of replacing the plant at a particular moment, when actual reproduction would require a period that must be measured by years.

When a court declares that the rate base shall be the value, instead of the historical cost or the amount prudently invested in the enterprise, it selects the standard for measuring the property on which compensation is to be paid. It lays down a rule of law; and in the performance of that function there is always a legitimate field for theory. But when, having selected value as the standard for the rate base, the court undertakes to find what that value is at the date of the rate hearing, it purports to make a finding of fact. The process of determining facts will inevitably be misleading unless each step bears a close relation to the realities of life.

The evidence introduced before the trial court, which seems to be in substance the same as that introduced before the Commission, is now before this Court. We have power to examine the evidence and to enter such decree as may be appropriate. Compare *Denver* v. *Denver Union Water Co.*, 246 U. S. 178. But the better practice

requires that the case be remanded to the District Court, so that the evidence may be re-examined there in the light of the applicable rules. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 293; *Pacific Tel. & Tel. Co.* v *Kuykendall,* 265 U. S. 196. Compare *Chicago, M. & St. P. Ry. Co.* v. *Tompkins,* 176 U. S. 167, 179; *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267; *Brown* v. *Fletcher,* 237 U. S. 583; *Gerdes* v. *Lustgarten,* 266 U. S. 321, 327. To this end the decree should, in my opinion, be reversed.

To avoid the possibility of misunderstanding, I add merely that, in my opinion, the facts of record, considered in connection with those of which we have judicial notice, do not justify holding that rates which yield a return of less than 7 per cent. would be so unreasonably low as to be confiscatory.

MR. JUSTICE STONE joins in this dissent.

GRAVES *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 320. Argued October 21, 1926.—Decided November 22, 1926.

1. The requirement of Minnesota Gen. Stats. 1923, §§ 5757–5763, that every applicant for a license to practice dentistry shall produce before the board of dental examiners "his diploma from some dental college of good standing," of which the board shall be the judge, does not violate the Fourteenth Amendment. P. 426.
2. A State may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications of learning and skill shall practice medicine or dentistry. P. 427.
3. The State is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may be declared unconstitutional only where they are arbitrary or unreasonable. P. 428.

166 Minn. 496, affirmed.

ERROR to a judgment of the Supreme Court of Minnesota which affirmed the judgment of a municipal court sentencing Graves for practicing dentistry without a license.

Mr. Russell C. Rosenquest, with whom *Mr. Charles H. Graves, pro se,* was on the brief, for plaintiff in error.

Messrs. Clifford L. Hilton, Attorney General of Minnesota, and *James E. Markham,* Deputy Attorney General, were on the brief, for the State of Minnesota.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case involves a single question relating to the constitutionality of the Minnesota statute regulating the practice of dentistry. Gen. Laws, 1889, c. 19, and amendments; embodied in Gen. Stats., 1923, §§ 5757–5763.

This statute prohibits the practice of dentistry by persons who have not been licensed by the board of dental examiners. Every applicant for a license is required to present himself for examination by the board and "produce his diploma from some dental college of good standing," of which the board shall be the judge, with satisfactory evidence showing his good moral character. The board shall then give him an examination to test thoroughly his fitness for practice; and, if he successfully passes this, shall register him as a licensed dentist.

Graves, the plaintiff in error, had applied for a license, but had been refused an examination by the board because he had no diploma from an accredited dental college. He was thereafter prosecuted in a municipal court for violating the statute by practicing dentistry without a license. He asserted his fitness to practice, and interposed a challenge to the constitutional validity of the statute. This was overruled, and he was found guilty and sentenced. The judgment was affirmed by the Su-

preme Court of the State, 166 Minn. 496; and the case is brought here by writ of error on the constitutional question.

The specific contention is that the requirement of the statute that an applicant for a license must present a diploma from an approved dental college before he can be examined by the board—which, in effect, limits the granting of licenses to persons having diplomas from dental colleges of good standing—is unreasonable, arbitrary and discriminatory, and violates the due process clause and other provisions of the Fourteenth Amendment.

It is well settled that a State may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications of learning and skill shall practise medicine or dentistry. *Dent* v. *West Virginia,* 129 U. S. 114, 122; *Douglas* v. *Noble,* 261 U. S. 165, 167. In the *Dent* case this Court said: "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity." (p. 122.)

In the *Douglas* case, which involved the constitutionality of a statute containing similar provisions to those of

the Minnesota statute, the validity of the provision that only persons having diplomas from a dental college should be eligible to examination for a license to practice dentistry, although not directly involved, was distinctly implied. The specific objection there was that the statute did not state in terms the scope and character of the examination to be made by the board of examiners, and therefore conferred upon it arbitrary power to grant or withhold licenses. But in answering this contention this Court said that the provision that the applicant must be a graduate of a reputable dental school and of good moral character, clearly indicated "the general standard of fitness and the character and scope of the examination"; and the constitutionality of the statute was sustained. (p. 167.)

By enacting the present statute the State has determined, through its legislative body, that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler* v. *Kansas,* 123 U. S. 623, 661. And the case is to be considered in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest. *Great Northern Ry. Co.* v. *Clara City,* 246 U. S. 434, 439; *Gitlow* v. *New York,* 268 U. S. 652, 668.

Clearly the fact that an applicant for a license holds a diploma from a reputable dental college has a direct and substantial relation to his qualification to practice dentistry. We cannot say that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment, it

determines that the holding of such a diploma is a necessary qualification for the practice of dentistry; or that the distinction made in the granting of licenses between applicants who hold such diplomas and those who do not, is a classification which has no real or substantial basis. And the constitutionality of the statute must be sustained.

This conclusion is in harmony with the decisions in other state courts involving the constitutional validity of statutes regulating the practice of medicine or dentistry which contain similar or analogous provisions, as well as with the earlier Minnesota decisions. *In re Thompson,* 36 Wash. 377; *State* v. *Creditor,* 44 Kans. 565; *State* v. *Green,* 112 Ind. 462; *People* v. *Phippin,* 70 Mich. 6; *Ex Parte Spinney,* 10 Nev. 323; *State* v. *Vandersluis,* 42 Minn. 129; *State* v. *Graves,* 161 Minn. 422. And see *Hewitt* v. *Charier,* 16 Pick. (Mass.) 353; *Ex parte Whitley,* 144 Cal. 167; *Wert* v. *Clutter,* 37 Ohio St. 347; *Timmerman* v. *Morrison,* 14 Johns. (N. Y.) 369. And it is not in conflict with the decisions in *Smith* v. *Texas,* 233 U. S. 630, and *State* v. *Walker,* 48 Wash. 8, on which the plaintiff in error relies, which dealt with statutes attaching unreasonable and arbitrary requirements to the pursuit of the employments or trades of locomotive engineers and barbers. These manifestly involve very different considerations from those relating to such professions as dentistry, requiring a high degree of scientific learning.

The judgment is

Affirmed.

I. T. S. RUBBER COMPANY *v.* ESSEX RUBBER COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 36. Argued April 13, 1926.—Decided November 22, 1926.

1. The Court may decline to consider points not presented in compliance with Rule 25, concerning briefs. P. 431.

2. A decree of infringement recovered by a patentee in a suit against a dealer in goods embodying his invention, does not bind by estoppel the manufacturer of the goods, from whom the dealer procured them, where the manufacturer refused to become a party to or assume any control over the suit and took no part in it otherwise than in the adjustment of the damages after a decree *pro confesso* had been entered. P. 432.
3. Patent 14,049, reissued, January 11, 1916, to the I. T. S. Company, as assignee, on an original patent to Tufford, of 1914, for resilient heels, is limited, as to Claims 5–9, to the specific form of three-point-contact heel lift, whose upper side and breast edges, as well as all other points of the upper surface, lie below the plane passing through and defined by the rear upper edge and breast corners of the lift. P. 434.
4. Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping that element. P. 443.
5. Where a claim to a combination is thus restricted to specified elements, all must be regarded as material, and the limitations so imposed by the inventor must be strictly construed against him and looked upon as disclaimers. P. 444.
6. And the patentee, having thus narrowed his claim to obtain the patent, may not thereafter, by construction or by resort to the doctrine of equivalents, give the claim the larger scope which it might have had without the amendments amounting to a disclaimer. P. 444.
7. The claims in suit were not infringed by the heels made by defendant, which are not three-point-contact lifts, their upper side edges having no vertical curve and lying entirely in the same horizontal plane as the rear edge and breast corners. P. 444.

1 F. (2d) 780, affirmed.

CERTIORARI (266 U. S. 600) to a decree of the Circuit Court of Appeals which affirmed one of the District Court dismissing the bill in a patent infringement suit. The patent had been construed otherwise by the Circuit Court of Appeals for the Sixth Circuit in 260 Fed. 947. See also other cases cited in footnote 8 to the opinion.

Mr. F. O. Richey, with whom *Mr. Melville Church* was on the brief, for the petitioner.

Mr. Lucius E. Varney, with whom *Mr. Frederick L. Emery* was on the brief, for the respondent.

Mr. JUSTICE SANFORD delivered the opinion of the Court.

This is a suit in equity brought by the I. T. S. Rubber Company against the Essex Rubber Company in the Federal District Court for Massachusetts, for the infringement of United States patent No. 14,049, on resilient heels, reissued to the I. T. S. Company January 11, 1916, as assignee, on an original patent to John G. Tufford, issued in 1914. After final hearing on the pleadings and proof [1] the bill was dismissed by the District Court for want of infringement. This was affirmed by the Circuit Court of Appeals, 1 F. (2d) 780. And there being a conflict of opinion with the Circuit Court of Appeals for the Sixth Circuit as to the scope of the patent, this writ of certiorari was granted.

The Essex Company, which manufactures and sells the heels alleged to infringe, expressly admitted the validity of the reissued patent. And the only questions are: First, whether it is estopped to deny infringement; second, if not, whether infringement is shown.

1. In the courts below the I. T. S. Company relied on estoppels by reason of adjudications in various prior suits brought by it in the Sixth Circuit against dealers in the Essex Company's heels. In the brief for the I. T. S. Company in this Court it is asserted, in general terms, that the action of the Essex Company " in suits brought against its jobbers in the Sixth Circuit estop it from denying in-

[1] Various intermediate proceedings, on a preliminary motion to dismiss, appear in 270 Fed. 593 (D. C.), 276 Fed. 478 (C. C. A.), and 281 Fed. 5 (C. C. A.).

fringement here," and that the Circuit Court of Appeals erred in holding that it was not estopped by the decrees in such suits. The argument in the brief, however, specifies and deals with only one of such prior suits; and there being as to the others no semblance of compliance with the requirements of Rule 25 of this Court,[2] we need consider only the suit specifically relied on.

That was a suit brought by the I. T. S. Company against one Wendt, a dealer in Essex heels of a type involved in the present suit, in which infringement of the patent was adjudged. The I. T. S. Company contends that the Essex Company, although not a party of record, took entire control of the defense, participated in the suit until the final decree, paid all the expenses, and is now estopped from denying infringement as therein adjudged.

The material facts found by the District Court are: The Essex Company, after being notified by Wendt of the commencement of the suit, notified the counsel of the I. T. S. Company that it did not wish to, and would not, appear. Wendt thereafter voluntarily allowed the suit to go by default, and an order was entered taking the bill *pro confesso*. This was followed by an interlocutory decree *pro confesso* adjudging the infringement of the patent and Wendt's liability for damages and profits, and ordering an accounting. Down to the entry of this decree the Essex Company exercised no control over the management and conduct of the suit. Thereafter the Essex Company, having previously written Wendt that it would reimburse

[2] This rule provides that the brief for the plaintiff in error, appellant or petitioner shall contain, *inter alia*, a "concise statement of the case, containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record," cl. 2(d); a "specification of such of the assigned errors as are intended to be urged," cl. 2(e); and an "argument exhibiting clearly the points of fact and of law being presented," cl. 2(f). 266 U. S. 671.

him for any losses he sustained by reason of the suit, suggested that he and counsel whom it had employed procure an adjustment of the damages and profits. Wendt and the counsel for the Essex Company thereupon secured an agreement to settle the case by Wendt's payment of $1,000. This was embodied in a stipulation signed by the I. T. S. Company's counsel and by the Essex Company's counsel as counsel for Wendt, and filed in the case. This stipulation, with the interlocutory decree, was thereafter made the basis of a final decree, re-adjudging the infringement, reciting the settlement, and adjudging that the I. T. S. Company recover of Wendt $1,000 and the costs of the suit. Wendt paid this judgment and was reimbursed by the Essex Company. The District Court further found specifically that, under the circumstances, the Essex Company did not control the suit; and held that, even though the I. T. S. Company understood that the counsel negotiating the settlement represented the Essex Company as well as Wendt in adjusting the damages, it was not estopped from contesting the question of infringement raised in the present case.

On the appeal the Circuit Court of Appeals stated that the record showed clearly that the Essex Company refused to become a party to the suit or assume any control over it, and took no part in the conduct or control of the suit, "but only in the adjustment of the damages" after the *pro confesso* decree had been entered; and approved both the findings and ruling of the District Court.

There is nothing which, under the well settled rule, *Del Pozo* v. *Wilson Cypress Co.*, 269 U. S. 82, 89, justifies us in disturbing the concurrent findings of fact of the two courts below; and we concur in their ruling that on the facts thus found the Essex Company is not estopped from contesting the question of infringement.

2. The question of infringement as here presented turns upon matters of law arising out of a file wrapper

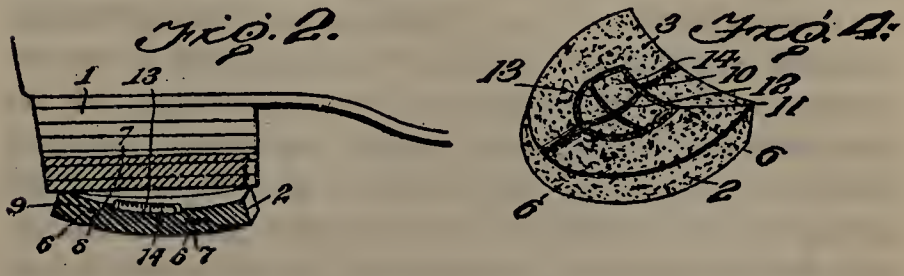
defense interposed by the Essex Company, which insists that the reissued patent, although valid, was so limited in scope by the proceedings in the Patent Office that the Essex heels do not infringe.

The patent covers the part of a shoe commonly called a rubber heel, or cushion heel lift.[3] This is usually made of rubber, and is attached to the under side of the leather heel so as to furnish a yielding, resilient heel, giving softness to the tread and quietness in walking. These heels, which are in common use, are of two types, the flat and the concavo-convex, both of which were old when Tufford made his invention. The flat heel, which is the older, is cemented to the leather and then fastened on by nails or screws. The driving in of the nails or screws, however, has a tendency to cause the rubber to spring away from the leather around the edges and produce an open seam. In the concavo-convex type the body of the rubber heel is curved downwards. It is attached to the leather heel, without any cement, by placing its upper concave side under the leather, pressing it upward flatly and then nailing or screwing it on tightly. This, through the tendency of the rubber to resume its original curved form, tends to keep it tightly pressed upwards against the leather and overcome the tendency of the flat heels to separate from the leather at the edges. This characteristic of the concavo-convex heels, often called the "tight-edge effect," was referred to as early as 1889 in Ferguson's patent No. 638,228.

The Tufford heel is of the concavo-convex type. We insert here reproductions of Figure 2 of the drawings of the reissued patent, which is described as "a front to rear sectional view through the lift in position disposed against the under side of a shoe heel and immediately prior to application thereto," and shows one-half of the lift on a

[3] The under layers of shoe heels were called "lifts" by the cobblers.

median section; and of Figure 4, which is described as "a perspective view looking at the upper side of the lift removed."



The reissued patent contains ten claims. The first four, which repeat the claims of the original patent, relate merely to the form and position of the washers in a cushion heel lift, and to grooves, channels and suction areas in its concave surface. They are not here involved. The others are additional claims relating to shape defining improvements. The bill charges infringement of the new claims 5 to 9, inclusive. Claim 5 reads:

"A heel lift of substantially non-metallic resilient material having its body portion of concavo-convex form on every line of cross section, *the concave upper face lying entirely below a plane passing through the rear upper edge and the breast*[4] *corners of the lift.*"

The last clause in this claim, which we have italicised—about which the present controversy turns—is contained in all the other claims in suit in identical or precisely equivalent words, except that in claim 8 the word "rear" does not appear before the words "upper edge."[5] For immediate purposes we treat claim 5 as typical of all the claims in suit, passing for the moment the consideration of the question whether there is any essential distinction in respect to claim 8.

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[4] The "breast" is the front face of the heel.

[5] All these claims are set forth in full in the opinion of the Circuit Court of Appeals, at p. 781.

The Essex Company contends: (1) That by the proceedings in the Patent Office these claims were limited to the form of concavo-convex heel lift in which the concave upper face lies entirely below a plane passing through the rear upper edge and breast corners, that is, one in which, owing to the curvature of the upper face, only its rear edge and breast corners lie in the same horizontal plane, and its side and breast edges, as well as all other portions of its surface, lie below the plane passing through and defined by these three points—this being referred to as the "three-point-contact" form, since when the lift is brought in contact with the leather heel, before being flattened, only the rear edge and two breast corners will touch the leather. (2) That the claims, thus limited, are not infringed by the Essex heels, as their upper side edges, having no vertical curve, lie in and not below the plane passing through the rear edge and breast corners.

The file wrapper shows that on the application for the reissued patent it contained as first presented no reference to the position of the upper rear edge and breast edges of the lift in relation to the other portions of its upper surface. Several new claims were submitted some of which, at least,[6] described a lift having its attaching face concave on every line of cross section. These were rejected by the examiner on reference to Nerger's patent No. 661,129. Another set of claims was then substituted describing a heel lift of resilient material comprising a body portion of concavo-convex form on every line of cross section and normally held in such form by its own inherent resiliency. These were also rejected by the examiner on reference to Nerger.

After an interview with the examiner in which the applicant exhibited samples of his own lift and the Nerger lift, he then amended the specification by inserting the

[6] The file wrapper does not set forth all of these claims.

statement: "By reference to Figs. 2 and 4 of the drawings, *it will be seen that the concave upper face of the lift lies entirely below a plane tangent to the rear upper edge and the breast corners of the lift,* whereby to cause the entire margin of said lift to exert a uniform pressure on the heel of a shoe when the lift is positioned on the heel and the convex face thereof depressed to flatten said lift." He also substituted another set of claims, 5 to 9, inclusive. Claim 5—which was typical of all the others unless claim 8 was differentiated by the fact that the word "rear" did not appear before the words "upper edge"—read: "A heel lift of substantially non-metallic resilient material having its body portion of concavo-convex form on every line of cross section, *the concave upper face lying entirely below a plane tangent to the rear upper edge and the breast corners of the lift.*"

In presenting these amendments counsel for the applicant urged that Nerger's lift was not concavo-convex on every line of cross section since the deepest portion of the concavity in its upper surface was at the breast; and that its concave upper surface did not lie entirely below a plane tangent to the rear edge and breast corners. In replying, the examiner, after calling attention to the fact that on the application for the original patent the applicant had presented claims for a lift in which all the edges of the attaching face occupied the same plane—which were rejected—stated that Figure 2 of the drawings indicated the same construction and did not show a lift whose concave upper face lay entirely below a plane tangent to the rear upper edge and breast corners, as set forth in the amendment to the specification, since a point midway between the breast corners was in contact with the upper heel, and "a plane tangent to the rear edge and the breast corners would also pass through the entire front [breast] edge"; that the applicant's sample lift did "not correspond to the drawing, since all the points

of its breast except the two corner points lie below a straight line passing through these points"; that in "each of the claims 5, 6, 7, 8 and 9 the applicant specifies that the concave upper face lies entirely below a plane tangent to the rear upper edge and the breast corners"; and that these claims do "not read on the drawing, and are therefore rejected."

To meet this rejection the applicant further amended the specification by substituting for the prior amendment the statement: "By references to Figs. 2 and 4 of the drawings, it will be seen that the concave upper face of the lift lies entirely below a plane passing through the rear upper edge and breast corners of the lift . . . *In other words, owing to the curvature of the concave attaching face of the lift, the rear upper edge and breast corners of said concave attaching face are disposed in a plane above the upper side edges and the breast edges of the lift.*" He also amended each of the claims by substituting the words "passing through" for "tangent to"—corresponding to the change that had been made in the specification—and added claim 10, reading: "A heel lift of substantially resilient material comprising a body portion, the attaching face of which is concave and the tread face convex on every line of cross section, the rear upper edge and breast corners of the concave attaching face of the lift being disposed in a plane above the upper side and breast edges of said concave attaching face." In presenting these amendments counsel for the applicant stated that the matter quoted by the examiner from the file wrapper of the original patent merely showed, if anything, that error had crept into the prosecution of the original application, which should be corrected; that as Figure 4 of the drawings showed "that the breast lift was cut away on a curved line, the attaching face of the lift at the breast thereof must necessarily lie in a plane below

the breast corners and the rear edge of said lift or, in other words, the rear upper edge and breast corners of the concave attaching face are disposed in a plane above the upper side and breast edges thereof"; that the showing in Figure 2 was therefore obviously erroneous, and, although claim 10 read upon it without any correction, it did not clearly illustrate the applicant's invention; and that permission was requested to correct the drawing. This was granted, and Figure 2 was changed to the form which we have reproduced in this opinion, showing that the upper side and breast edges lie below a plane passing through the rear edge and breast corners. The new claims were then allowed, and the patent was re-issued.

It thus appears that the applicant acquiesced in the successive rejections by the examiner on reference to Nerger of claims for a lift having its attaching face concave on every line of cross section and for a lift of resilient material of a concavo-convex form on every line of cross section, and that to meet this reference he amended the specification so as to state not only that the concave upper surface lies entirely below a plane passing through the rear upper edge and breast corners, but that "in other words," owing to the curvature of the concave attaching face the rear upper edge and breast corners are disposed in a plane above the upper side and breast edges; amended the claims to describe a lift whose concave upper surface lies entirely below a plane passing through the rear upper edge and breast corners; and finally changed his drawing so as to correspond precisely with these amendments—and that then, and not until then, were the claims allowed.

We think that by this proceeding the claims were limited to the specific form of a "three-point-contact" lift, that is, to one in which, owing to the vertical curve of the upper side and breast edges, these edges, as well

as all other portions of the upper surface, lie below the plane passing through and defined by the rear upper edge and breast corners. We cannot agree with the opinion of the Circuit Court of Appeals for the Sixth Circuit in *United States Rubber Co.* v. *I. T. S. Rubber Co.*, 260 Fed. 947, 948, that claim 10, which contains the limiting clause "the rear upper edge and breast corners of the concave attaching face of the lift being disposed in a plane above the upper side and breast edges," is the only one which is limited to the three-point-contact lift. It is true that if the limiting clause in claims 5 to 9, "the concave upper face lying entirely below a plane passing through the rear upper edge and breast corners," stood alone, there might be some question as to whether the side and breast edges were to be considered as a part of the upper face. However, the meaning of this clause was made entirely clear by the last amendment to the specification, adding to the previous statement that the concave upper face lies entirely below a plane passing through the rear upper edge and breast corners, that, "in other words," the rear upper edge and breast corners are disposed in a plane above the upper side and breast edges. We are unable to agree with the view that the phrase "in other words" was here used to connect alternative thoughts which were not identical, and think that they were used in their ordinary sense to introduce a specific element of the identical matter previously described, precisely defining a lift whose upper surface lies below a plane passing through the rear edge and breast corners as one whose upper side and breast edges lie below this plane—this being emphasized by the statement made by counsel for the applicant and the corresponding change which was made in the drawing. The limiting clause in claims 5 to 9 must therefore be read in the sense in which it is thus defined by the specification, that is, as referring to a three-point-contact lift whose side and breast edges, as well as all other points in its upper surface, lie below

the plane passing through the rear edge and breast corners.

There is no ground for differentiating claims 5 to 9 from claim 10 in this respect in order to give effect to claim 10. The Circuit Court of Appeals for the Sixth Circuit expressly declined to rest its conclusion on this ground (p. 948). And as to this it suffices to say, that, as was pointed out by the District Judge, claims 5 to 9 are sufficiently differentiated in other respects by the presence of subsidiary elements relating to the character of the material, nail openings, etc., that do not appear in claim 10.

We find, further, no significance in the substitution of the words "passing through" for "tangent to" in the specification and claims. These phrases were used interchangeably by the examiner. The applicant pointed out no distinction in their meaning, and, so far as appears, merely adopted "passing through" as the preferred form of equivalent expressions. And they have no difference in meaning as used in the specification and claims; the one phrase as well as the other aptly defining the plane passing through the upper rear edge and breast corners.

We also find that the fact that the word "rear" does not appear before the words "upper edge" in claim 8 is not a ground upon which it may be differentiated from the others. It appears that this omission was inadvertent and unnoticed. The applicant called no attention to the omission and did not differentiate this claim from the others in his effort to avoid the reference to Nerger's patent. The examiner stated that "each of the claims 5, 6, 7, 8 and 9" specified a plane tangent to "the rear upper edge and the breast corners." And we cannot believe that if the applicant's counsel intended to differentiate this claim from the others by the omission of the word "rear," he would have failed to disclose the distinction

which he had in mind and permitted the examiner to pass upon the claim under a misapprehension as to its language. It was also stated by the District Judge that at the preliminary hearing on the motion to dismiss, the I. T. S. Company recognized that this clause in claim 8 read the same as in the other claims; that this had apparently been its position before other courts where these claims had been considered[7]; and that it did not change its position in this respect until after the Circuit Court of Appeals on the hearing in that court on the motion to dismiss had called attention to the omission of the word "rear." We concur in the finding of the District Judge that the omission of the word "rear" was through a clerical error due to oversight, and that both the counsel for the applicant and the examiner understood that it was contained in claim 8 as well as the others; and we are of opinion that the claim should be construed and have the same effect as if it had been included. This is not in any real sense, a re-making of the claim; but is merely giving to it the meaning which was intended by the applicant and understood by the examiner.

Furthermore, if by the omission of the word "rear" this claim should otherwise be regarded as calling for a lift whose upper face lies entirely below a plane passing through the entire "upper edge" and the breast corners, thereby making it a claim for a lift having all its upper edges in the same plane, such a construction would not only conflict with the express disclaimer of counsel for the applicant, but, as held by the Circuit Court of Appeals, render the claim invalid as being for a different invention from that described in the specification and drawings of the original patent. *Mahn* v. *Harwood,* 112

[7] Thus in the *U. S. Rubber Co.* case the Circuit Court of Appeals for the Sixth Circuit stated that "each of the claims 5 to 9, inclusive," contains the limiting clause referring to "a plane passing through the rear upper edge and breast corners."

U. S. 354, 359; *Parker & Whipple Co.* v. *Yale Lock Co.*, 123 U. S. 87, 97. And so construed, it would not read on the specification and drawings of the re-issued patent.

Having thus reached the conclusion that all of the claims in suit are limited to the three-point-contact form of lift, it is unnecessary to determine here whether in calling for a lift of concavo-convex form on every line of cross section, any of them are also limited to a "saucer-shaped," as distinguished from a "scoop-shaped," lift, that is, to one having in its upper surface a low spot centrally disposed which is below the lowest point in the breast edge, as has been held by the Circuit Courts of Appeals for the Sixth and Seventh Circuits.[8]

It is well settled that where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. *Shepard* v. *Carrigan*, 116 U. S. 593, 597. If dissatisfied with the rejection he should pursue his remedy by appeal; and where, in order to get his patent, he accepts one with a narrower claim, he is bound by it. *Shepard* v. *Carrigan, supra*, 597; *Hubbell* v. *United States*, 179 U. S. 77, 83. Whether the examiner was right or wrong in rejecting the original claim, the court is not to inquire. *Hubbell* v. *United States, supra*, 83. The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules

[8] *Fetzer & Spies Leather Co.* v. *I. T. S. Rubber Co.*, 260 Fed. 939, *United States Rubber Co.* v. *I. T. S. Rubber Co., supra*, 950, *Tee Pee Rubber Co.* v. *I. T. S. Rubber Co.*, 268 Fed. 250, *Hill Rubber Heel Co.* v. *I. T. S. Rubber Co.*, 269 Fed. 270, and *I. T. S. Rubber Co.* v. *Tee Pee Rubber Co.*, 288 Fed. 794, in the Sixth Circuit; and *United States Rubber Co.* v. *I. T. S. Rubber Co.*, 288 Fed. 786, in the Seventh Circuit.

that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers. *Sargent* v. *Hall Safe & Lock Co.*, 114 U. S. 63, 86; *Shepard* v. *Carrigan, supra,* 598; *Hubbell* v. *United States, supra,* 85. The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim as would be equivalent thereto. *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 529. So where an applicant whose claim is rejected on reference to a prior patent, without objection or appeal, voluntarily restricts himself by an amendment of his claim to a specific structure, having thus narrowed his claim in order to obtain a patent, he "may not by construction, or by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments which amount to a disclaimer." *Weber Elec. Co.* v. *Freeman Elec. Co.*, 256 U. S. 668, 677.

It results that as the claims in suit were limited by the proceedings in the Patent Office to the specific form of a three-point-contact lift, they are not infringed by the heels made by the Essex Company, which are not three-point-contact lifts, their upper side edges having no vertical curve and lying entirely in the same horizontal plane as the rear edge and breast corners. Nor can they be held to be infringements even if we assume that, as asserted, they function in the same manner as three-point-contact lifts, and would infringe, as was conceded in the District Court, if the claims were not restricted by the limiting clause and were entitled to a construction warranting a wide range of equivalents. By the limitation of the claims in the Patent Office proceeding to the three-point-contact lift the patentee made this precise form a

material element, and having thus narrowed the claims, cannnot, as was said in the *Weber Electric Company* case, now enlarge their scope by a resort to the doctrine of equivalents. This would render nugatory the specific limitation.

The decree is accordingly

Affirmed.

SOUTHERN PACIFIC COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 239. Argued October 6, 1926.—Decided November 22, 1926.

1. Military impedimenta were shipped by the War Department by expedited service over a railroad which was bound by land-grant acts to transport property of the United States "at rates not exceeding 50 per cent. of those paid by private shippers for the same kind of service." The railroad had no tariff for such service available to the public at large but had filed with the Interstate Commerce Commission a special tariff for the Government, in such cases, without land-grant deductions. *Held*, (1) that no contract of the United States to pay the special tariff rate could be implied from the fact that the shipments were made when the special tariff was the only one applicable on file, in the absence of proof that the contracting officers then knew of that tariff; (2) that, the special tariff was filed without statutory authority; hence the officers were not chargeable, as a matter of law, with knowledge of it. P. 447.
2. To recover in the Court of Claims the reasonable value of service rendered the Government, the claimant must prove its value. P. 448.

60 Ct. Cls. 662, affirmed.

CERTIORARI (270 U. S. 103) to a judgment of the Court of Claims rejecting the petitioner's claim on account of transportation service rendered to the United States.

Mr. William R. Harr, with whom *Mr. Charles H. Bates* was on the brief, for the petitioner.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* was on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner brought suit in the Court of Claims to recover for the transportation over its lines of several shipments of military impedimenta, made by the War Department in 1916 and 1917. The court allowed recovery for five items and denied recovery for certain others, which are alone the subject of controversy here. This Court granted certiorari. 270 U. S. 103, 107; § 3(b) Act of February 13, 1925, c. 229, 43 Stat. 939.

Some of the lines of petitioner were constructed with the aid of land-grants by the United States under acts of Congress requiring land-aided railroads to transport troops, munitions of war, and property of the United States at rates not exceeding fifty per cent. of those paid by private shippers for the same kind of service, §§ 11, 18, Act of July 27, 1866, c. 278, 14 Stat. 297, 299; see also Appropriation Acts for army transportation for years 1916–1917; Act of March 4, 1915, c. 143, 38 Stat. 1076, 1077; Act of August 29, 1916, c. 418, 39 Stat. 633, 634.

At the time of the transportation, the tariff in force on petitioner's road available to the public at large, Western Classification, 54 I. C. C. No. 12, did not include any of the items of military impedimenta here involved. But petitioner then had on file with the Interstate Commerce Commission a special tariff applicable to such items when carried by passenger train or expedited service, without deduction for shipments made over land-aided or land-grant roads.

Petitioner presented its bills for the expedited service in transporting the items controverted, on the basis of the rates fixed by this tariff, without deduction. The accounting officers of the government allowed the claim at a

lower rate corresponding to the schedule embraced in the Western Classification applicable to emigrant movables carried by ordinary freight trains, and payment thus computed with land-grant deductions was received by petitioner under protest.

The Court of Claims held that the rate on emigrant movables was inapplicable and that petitioner did not establish a lawful rate by leaving a special tariff schedule with the Interstate Commerce Commission, since there is no provision of law requiring or permitting the filing of tariffs applicable only to government transportation. But it is argued here as it was below, that since there was no rate open to the public applicable to the items involving expedited service, the shipments by representatives of the War Department, following the filing of the special tariff for that service, must be taken to establish an implied agreement to pay the special tariff rate. And further, since the agreed rate was not open to the public, there could be, by the very terms of the applicable acts of Congress, no land-grant deductions.

This reasoning omits a step essential to the imposition of a contractual liability upon the government, for it points to no fact found from which assent of the shipper to the special tariff rate could be inferred. The Court of Claims found that there was no express agreement that the shipments were based upon the special tariff, and that there was no proof that the contracting officers had any knowledge of the tariff at the time of the shipments. Obviously they cannot be held to have yielded assent to a tariff of which they were ignorant. A basis for a contract implied in fact to pay the rate charged is therefore wanting. In this respect the case differs from those in which a recovery was allowed where there was no lawful tariff and the shipments were made with knowledge on the part of the government representatives of the rates published by the carrier. Compare *Yazoo & Miss. Valley R. R.* v. *The United States,* 54 Ct. Cls. 165.

Nor were the representatives of the War Department chargeable as a matter of law with knowledge, which they did not in fact possess, of a tariff which was not required to be filed. The ordinary consequences that attend the filing of a schedule of rates with the Interstate Commerce Commission as demanded or permitted by statute, cf. *Texas & Pacific Ry.* v. *Mugg*, 202 U. S. 242; *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155, cannot be invoked by the carrier merely because it lodged a special tariff with the commission without statutory authorization. *Illinois Central R. R.* v. *The United States*, 58 Ct. Cls. 182.

Petitioner is in no better situation with respect to its asserted right to recover the reasonable value of its services. The burden was upon it to establish their value. The record contains no finding of the reasonable value of these services, and petitioner failed, as the court below found, to offer any proof of the reasonableness of the rate which it sought to apply.

Judgment affirmed.

BRASFIELD ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 243. Argued October 13, 1926.—Decided November 22, 1926.

1. An inquiry, put by the trial judge to a jury unable to agree, asking the extent of its division numerically, is *per se* ground for reversal. P. 449.
2. Failure of counsel to particularize an exception to such an inquiry does not preclude this Court from correcting the error. P. 450.

8 F. (2d) 472, reversed.

CERTIORARI (269 U. S. 550) to a judgment of the Circuit Court of Appeals affirming a conviction in a prosecution for conspiracy.

Mr. John W. Preston for the petitioner, submitted.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Mr. William D. Whitney,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioners were convicted in the District Court for northern California of the offense (§ 37 of the Criminal Code) of conspiracy to possess and transport intoxicating liquors in violation of the National Prohibition Act. The conviction was affirmed by the Court of Appeals for the Ninth Circuit. 8 Fed. (2d) 472. This Court granted certiorari. 269 U. S. 550; Jud. Code, § 240(a) as amended.

The only errors assigned which are pressed upon us concern proceedings had upon the recall of the jury after its retirement. The jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically, and was informed by the foreman that it stood nine to three, without his indicating which number favored a conviction.

In *Burton* v. *United States,* 196 U. S. 283, 307, where a conviction was reversed on other grounds, this Court condemned the practice of inquiring of a jury unable to agree, the extent of its numerical division, although a response indicating the vote in favor of or against conviction was neither sought nor obtained. This Court then said (p. 308):

" . . . we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge."

There is a diversity of view in the circuit courts of appeals whether non-compliance with the rule as stated in the *Burton* case is reversible error, or whether the expressions in that opinion are hortatory only. See *St. Louis & S. F. R. R.* v. *Bishard* (C. C. A. 8th), 147 Fed. 496; *Stewart* v. *United States* (C. C. A. 8th), 300 Fed. 769, 782, *et seq.; Nigro* v. *United States* (C. C. A. 8th), 4 Fed.

(2d) 781, holding that the inquiry requires a reversal; and compare *Bernal* v. *United States* (C. C. A. 5th), 241 Fed. 339, 342; *Quong Duck* v. *United States* (C. C. A. 9th), 293 Fed. 563, 564, supporting the view that the practice, while improper, is not prejudicial error.

We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this Court from correcting the error. Cf. *Wiborg* v. *United States*, 163 U. S. 632, 658, *et seq.*; *Clyatt* v. *United States*, 197 U. S. 207, 220, *et seq.*; *Crawford* v. *United States*, 212 U. S. 183, 194; *Weems* v. *United States*, 217 U. S. 349, 362. This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done.

It is unnecessary to consider other assignments of error directed to the instructions given the jury at the time of its recall.

Judgment reversed.

HUDSON ET AL. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 307. Argued October 21, 1926.—Decided November 22, 1926.

After accepting a plea of *nolo contendere* to an indictment charging an offense punishable by imprisonment, or fine, or both, a federal court may impose a prison sentence. P. 451.

9 F. (2d) 825, affirmed.

CERTIORARI (271 U. S. 652) to a judgment of the Circuit Court of Appeals affirming sentences of imprisonment imposed, on pleas of *nolo contendere,* in a prosecution for conspiracy to use, and for using, the mails to defraud.

Mr. B. B. McGinnis, with whom *Mr. Frank P. Patterson* was on the brief, for the petitioners, submitted.

Mr. Charles Bunn, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioners were indicted in the District Court for western Pennsylvania for conspiracy to use and for using the mails to defraud, crimes punishable by fine or imprisonment or both (§§ 37, 215, Criminal Code). On pleas of *nolo contendere* they were sentenced to imprisonment for one year and one day. The conviction and sentence were affirmed by the Court of Appeals for the Third Circuit. 9 Fed. (2d) 825. The case is here on certiorari. 271 U. S. 652, Jud. Code, § 240(a), as amended.

The sole question raised by the assignment of error is whether a United States court, after accepting a plea of *nolo contendere,* may impose a prison sentence. It is the contention of petitioners that the plea in effect is conditioned upon the imposition of a lighter penalty; that

therefore the court may not accept the plea to an indictment charging a crime punishable by imprisonment only, and if accepted where the crime is punishable by imprisonment or fine, or both, it may not accept the plea and ignore the condition by imposing a prison sentence. This contention is supported by *Tucker* v. *United States* (C. C. A. 7th), 196 Fed. 260; *Shapiro* v. *United States* (C. C. A. 7th), 196 Fed. 268; *Blum* v. *United States* (C. C. A. 7th), 196 Fed. 269; in which sentences of imprisonment on the plea of *nolo contendere* were set aside. But in *United States* v. *Lair* (C. C. A. 8th), 195 Fed. 47, *habeas corpus* was denied a prisoner confined for a two-year term upon this plea, but the objection pressed here apparently was neither raised nor considered. The state courts have rejected the contention when made.[1]

The use of the plea in the federal courts and the propriety of imposing a prison sentence upon it are recognized by the Probation Act; March 4, 1925, c. 521, 43 Stat. 1259. Section 1 of that Act provides for the suspension of sentence and the release of the prisoner on probation "after

[1] The precise question has rarely been raised. The contention now considered was explicitly rejected in *Commonwealth* v. *Ferguson*, 44 Pa. Sup. Ct. 626. In most cases, however, the courts have ordered imprisonment on pleas of *nolo contendere* without discussing the matter. *Commonwealth* v. *Holstine*, 132 Pa. 357; *State ex rel. Peacock* v. *Judges*, 46 N. J. L. 112; *Philpot* v. *State*, 65 N. H. 250; *In re Lanni* 131 Atl. 927. *State* v. *Burnett*, 174 N. C. 796, may be cited as more than inferentially recognizing the power to impose a prison sentence since the court expressly considered its authority to order imprisonment, after having granted a suspended sentence upon this plea. The plea has of course been received in prosecutions for offenses punishable by fine only, without any intimations being made that its use is restricted to such cases, *Young* v. *People*, 53 Colo. 251; *State* v. *Hopkins*, 4 Boyce 306; and accepted on charges punishable by both fine and imprisonment and a fine only imposed. *Williams* v. *State*, 130 Miss. 827. In Illinois, Indiana, and Minnesota the plea is not allowed. See *People* v. *Miller*, 264 Ill. 148, 154; *Mahoney* v. *State* (Ind.), 149 N. E. 444, 447; *State* v. *Kiewel* (Minn.), 207 N. W. 646, 647.

conviction, or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment."

The plea of *nolo contendere* was known to the common law, and is referred to, although not by name, by a modern English text writer. See Archbold's Pleading, Evidence and Practice in Criminal Cases (26th ed. 1922) 379. But no example of its use in the English courts has been found since the case of *Queen* v. *Templeman,* decided in 1702, 1 Salk. 55, where, although a fine was imposed, the question now under consideration was neither decided nor discussed.

The view of the court in the *Tucker* case that a prison sentence may not be imposed on the plea of *nolo contendere* rests upon no more substantial basis than a possibly ambiguous phrase in a passage from Hawkins, Pleas of the Crown, 8th ed., Book 2, ch. 31, 466. The author prefaces the chapter, "Of Confessions and Demurrer," with the remark "And now I am to consider what is to be done to a prisoner upon his confession; which may be either Express or Implied." In §§ 1 and 2, he points out that a confession of guilt "carries with it so strong a presumption of guilt, that an entry on record, *quod cognovit indictamentum,* etc., in an indictment of trespass, estops the defendant to plead 'not guilty' to an action brought afterwards against him for the same matter." He then says:

"Sec. 3. An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis,* without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum.*"

This passage appears in all the earlier editions of Hawkins. It has been handed down from generation to generation of text writers in substantially the same form with occasional glosses, but researches rarely went further.[2] Similarly judicial study of the history of the plea halts with Hawkins.

The author, neither here nor elsewhere, fulfills his promise "to consider what is to be done to a prisoner upon his confession." It is to be noted that this and the preceding sections are directed only to the effect of the confession, whether express or implied, as an estoppel. He does not undertake to state with any certainty the precise effect of the implied confession upon the sentence. Putting oneself on the mercy of the king seems to have been at least an appeal for mercy, and at most a consent

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[2] Comyns in his "Digest," under Indictment, ch. K, at p. 513 of the 1765 ed., "Confessions," draws the same distinction between the two types of confessions and cites as his sole authority, 9 H. VI, 60. Viner similarly considers the different effects of the pleas as estoppels. (Abridgment, 2nd ed. 1792, Vol. 10, Estoppel, pp. 435–6.) Burn practically quotes Hawkins who is his only authority (Justice of the Peace, 5th ed. 1758, Confession, 149–150). This passage is still printed in the thirtieth edition of 1869, edited by J. B. Maule. Chitty, relying upon Hawkins, Comyns, Burn, and the case of *Queen* v. *Templeman*, *supra*, makes no further contribution (The Criminal Law, 1819, Vol. I, p. 431). In Jervis' twelfth edition of Archbold (1853) the effect of the plea upon an indictment for misdemeanor is described, the passage intimating that its only use is in such crimes. No authority for the restriction is offered other than Hawkins, who merely limited the use to "a case not capital." This passage is repeated in all the later editions and is the same as that in the 26th edition already cited. Gabbett, Criminal Law (1843) 320; 1 Colby, Criminal Law (1868) 287; Clark, Criminal Procedure (1895) 374, to cite a few of the standard treatises of that century, with no pretension of completeness, rely upon Hawkins essentially for their historical data. As for the more modern texts, 2 Wharton, Criminal Procedure (10th ed. 1918), § 1346, adds nothing, and 2 Bishop, New Criminal Procedure (2nd ed. 1913), § 802, limits the availability of the plea to light misdemeanors. The encyclopedias and dictionaries go back to Hawkins and indicate the variations of state court decisions.

to be fined if let off with that—not a plea, but a petition, the rejection of which may possibly have required a plea. The text states the rule of law that has never been questioned, that the implied confession, as contrasted to the express confession, does not estop the defendant to plead and prove his innocence in a civil action.

But even if we regard the implied confession as a petition which in Hawkins' time had to be accepted as tendered, in modern practice it has been transformed into a formal plea of *nolo contendere*. Like the implied confession, this plea does not create an estoppel, but, like the plea of guilty, it is an admission of guilt for the purposes of the case. Section 3, it is true, speaks of the defendant's yielding to mercy and his desire "to submit to a small fine"; but even if we assign to these words the more comprehensive meaning suggested, they do not say that the court is bound to yield to the prisoner's petition in fixing sentence, nor do they suggest that the court by accepting a formal plea which admits guilt for the purposes of the case would be bound to yield to its implied appeal for mercy.

The genesis of the phrase "desiring to submit to a small fine," used by Hawkins, indicates unmistakably that its purpose was illustrative only. The authorities cited by Hawkins are Lambard's Eirenarcha, Book 4, ch. 9; 9 H. VI, 60; 11 H. IV 65; 1 Fitzherbert, Gr. Abr., Estoppel, par. 24. The pertinent passage in Lambard is:

". . . as where he putteth himselfe in *Gratiam Reginae, & petit admitti per finem,* without any more, or (by Protestation that he is not guilty) pleadeth his pardon; and such a Confession (if I may so call it) doth not so conclude him, but that he may afterward plead Not guiltie in any Action brought against him . . ." (p. 506.)

The authorities cited, as in Hawkins, are 9 H. VI, 60 and 11 H. IV, 65. In the same chapter, Lambard, in a passage for which no counterpart is found in Hawkins,

unless it be the phrase already considered, queries whether the justices may reject the plea and in consequence "drive the party either to an absolute confession (for increase of the Fine) or to his Traverse, that (failing therein) he may be imprisoned and fined also." But this query leaves it uncertain whether the reduction of sentence following the implied confession is a matter of right upon which the prisoner may insist, or discretionary with the court.

Of the reports from the year books cited both by Hawkins and Lambard, 11 H. IV deals with express confessions. The extract from 9 H. VI is a colloquy between counsel and the court. The translation is printed in the margin.[3] Its effect is that if one, indicted for trespass, has "put himself on the grace of our Lord the King and asked that he might be allowed to pay a fine (*petit se admitti per finem*)," his plea, if accepted, does not estop him from afterwards pleading not guilty. We have here the same illustration used by Hawkins and Lambard properly applied, as the case was one of trespass, but there is no suggestion that would warrant the conclusion that a court, by the mere acceptance of the plea of *nolo contendere,* would be limited to a fine in fixing sentence. Fitzherbert merely digests this year book case. A cita-

[3] "WESTON. If one be indicted for Trespass, and he surrenders and pays a fine, will he be permitted afterwards to plead Not Guilty?

"PASTON. (J.) Yes; certainly.

"Which was agreed by all the Court.

"WESTON. It is of record that he admitted it.

"BABBINGTON. If the entry be so, he will be estopped; but the entry is not so, but is thus, that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admitti per finem*).* Therefore, if one be indicted for felony, and has a charter of pardon, and pleads it, and prays that it be allowed, this does not prove that he is guilty; but the King has excluded himself (from claiming guilty) by his charter. And I and all the Court are against you on this point."

*The folio reads *admittit,* obviously a mistake.

tion to Farresly, 40, added in the later editions of Hawkins, is the case of *Queen* v. *Templeman* in Salkeld to which reference has already been made.

We think it clear, therefore, that the contention now pressed upon us not only fails of support in judicial decisions, other than those of the seventh circuit already noticed, but its historical background is too meager and inconclusive to be persuasive in leading us to adopt the limitation as one recognized by the common law.

Undoubtedly a court may, in its discretion, mitigate the punishment on a plea of *nolo contendere* and feel constrained to do so whenever the plea is accepted with the understanding that only a fine is to be imposed. But such a restriction made mandatory upon the court by positive rule of law would only hamper its discretion and curtail the utility of the plea.

Judgment affirmed.

UNITED STATES ET AL. v. NEW YORK CENTRAL RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 284. Argued October 29, 1926.—Decided November 22, 1926.

1. The jurisdiction of the Interstate Commerce Commission, under § 6, par. 13 of the Act to Regulate Commerce as amended, to compel a railroad carrier to provide transportation service between the public terminal of a barge canal and points on the railroad and its connections, may be invoked by a State which owns the canal and maintains it for the free use of the public, but which does not itself operate it as a carrier. P. 462.
2. Where the rail connection already exists, an order requiring the railroad to furnish the transportation at its own expense may be made without the presence of a water carrier. P. 464.
3. Such an order, under the statute, may extend to the entire current of commerce, flowing through the terminal, though intrastate in part. P. 464.

13 F. (2d) 200, reversed.

APPEAL from a decree of the District Court enjoining the enforcement of an order of the Interstate Commerce Commission requiring the New York Central Railroad Company to furnish transportation service between a terminal of the Erie Canal and the lines and connections of the railroad.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Robert E. Whalen, with whom *Mr. Charles C. Paulding* was on the brief, for the appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

The State of New York, by its Superintendent of Public Works, in a complaint filed with the Interstate Commerce Commission, sought to compel the New York Central Railroad Company to provide transportation service between the public terminal of the Erie Barge Canal at Buffalo and shippers located along its tracks and along the lines of other railroads with which it can interchange traffic. The service demanded included the furnishing of rolling stock, motive power, and the placing and removal of cars on the tracks within the terminal, incident to moving traffic between the terminal and appellee's lines. The jurisdiction of the commission was invoked under § 6, par. 13, of the Interstate Commerce Act as amended by the Panama Canal Act; August 24, 1912, c. 390, 37 Stat. 568, and §§ 412, 413, Transportation Act; February 28, 1920, c. 91, 41 Stat. 483.[1]

[1] "When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers,

A similar application had been made to the Public Service Commission of New York (Second District). The order of the commission granting this relief was vacated by the state Supreme Court on the ground that the traffic

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and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. . . ."

The Panama Canal Act also provides:

"The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing."

concerned was interstate in character, jurisdiction over which under the statutes already cited was in the Interstate Commerce Commission. *People ex rel. New York Central R. R.* v. *Public Service Commission,* 198 App. Div. 436; affirmed without opinion, 232 N. Y. 606.

In the proceedings before the Interstate Commerce Commission, two barge carriers, neither of which had filed rates with it or the Public Service Commission of New York, intervened and were made parties on their petitions setting forth that the interchange of traffic sought to be established by complainant was essential to their business.

After a full hearing the commission granted the relief sought. *State of New York* v. *New York Central R. R.,* 95 I. C. C. 119. The railroad company then filed a bill in equity in the District Court for northern New York to enjoin the enforcement of the commission's order. The case was heard on the record of the Interstate Commerce Commission proceedings by the District Court, three judges sitting, Urgent Deficiencies Act; October 22, 1913, c. 32, 38 Stat. 220; *Lambert Co.* v. *Balt. & Ohio R. R.,* 258 U. S. 377; which granted the injunction. 13 Fed. (2d) 200. The case comes here by direct appeal. Urgent Deficiencies Act, *supra.*

The State of New York built, owns and controls the Erie Barge Canal and terminals, wharves and docks used in connection with it, including the Erie Basin terminal at Buffalo. The canal extends eastwardly from Buffalo by a circuitous route to the Hudson River and has several branches. The State does not own barges or rolling stock; nor does it transport merchandise or operate the canal, but it maintains this waterway with its facilities open to free public use. About 75 per cent. of the traffic passing over it is interstate.

The Erie Basin terminal, having an area of 9.25 acres, is located on the harbor of Buffalo, adjacent to the right-of-

way of the railroad company. It includes two concrete piers with equipment for loading and unloading freight, and five thousand feet of railway track, with sidings, switches and storage tracks. There is a physical connection by switching tracks between the terminal and appellee's lines, which was made in 1919 under a contract between the Director General of Railroads and the State of New York. The New York Central's main road between Buffalo and New York City parallels the barge canal and serves important points reached by it or its connections. The effect of appellee's refusal to perform the transportation service ordered by the Commission is to preclude the interchange of traffic between rail carriers and barge canal carriers at Buffalo, and incidentally to avoid the diversion to the canal of a substantial amount of traffic now passing over the lines of the railroad company to and from industries located along its right-of-way.

In granting the injunction, the district court disregarded the intervention of the two canal carriers on the ground that they were not shown to be engaged in interstate commerce. Section 6, par. 13, of the amended Interstate Commerce Act insofar as it confers authority on the commission to order the operation of the connecting tracks and to determine the sum to be "paid to or by either carrier" was construed to require the presence of two carriers before the commission subject to its jurisdiction. It therefore held that the commission was without jurisdiction to grant the relief sought because there were not two carriers before it, and further, that the complainant, a sovereign State, as owner of the terminal but not a carrier, was beyond its regulatory powers, and presumably could not invoke its jurisdiction.

We lay to one side the question whether the intervenors within the meaning of these Acts are carriers of property which "may be or is transported from point to point in

the United States . . . not entirely within the limits of a single State." Nor need we consider to what extent, if at all, the State of New York in the event of its failure to maintain its tracks or facilities is beyond the regulatory or coercive power of the commission as asserted below. Cf. *Georgia* v. *Chattanooga,* 264 U. S. 472; *Bank of United States* v. *Planters' Bank,* 9 Wheat. 904, 907.

The jurisdiction of the commission in this case was properly invoked. A state, when its interests are concerned, as well as a private individual, whether carrier or not, may file a complaint with the commission. Interstate Commerce Act, § 13, as amended June 18, 1910, c. 309, 36 Stat. 550. Moreover a complaint is not a prerequisite to the exercise of jurisdiction by the commission. It may of its own motion investigate and act upon any matter which may be the subject of complaint (with exceptions not now relevant), § 13, par. 2, Interstate Commerce Act, as amended; Panama Canal Act, *supra,* at p. 568. Hence the only question that need be considered here is the power of the commission, assuming there was but one carrier before it, to issue the order now attacked.

The Panama Canal Act is by its terms supplemental to the Act to Regulate Commerce, and its obvious purpose was to extend to rail carriers connecting with water carriers in interstate commerce the requirements of § 1, par. 9 of the earlier acts, c. 3591, 34 Stat. 585, 586; c. 309, 36 Stat. 547, for furnishing switching and car service to lateral branch railroads and private sidetracks. By § 6, par. 13, so far as pertinent to the present inquiry, the commission is given authority to establish physical connection between the lines of the rail carrier and the dock of the water carrier, and to determine and prescribe the terms and conditions upon which the connecting tracks should be operated. It "may either in the construction or the operation of such tracks determine what sums shall be paid to or by either carrier."

We may assume, without deciding, that the commission may not determine the amount to be paid to or by either carrier concerned without having both before it. But the commission is not required by the terms of the statute to make such a determination and here it did not do so. A determination with respect to construction costs was not necessary since the physical connection had already been established. There could be no need for directing a contribution of operating expenses since the rail carrier was ordered to furnish the entire car service. It was free to establish such rates as it deemed reasonable, subject to review by the commission if necessary. The only parties concerned in the order actually made were those before the commission: appellee, which was required to furnish the service, and the State of New York, whose terminal facilities were thus to be used. To have required the presence of one or more canal carriers before the commission for the purpose of making this order would have been an idle ceremony. The construction of the Act contended for is unwarranted by its language and incompatible with its purpose to create an administrative body with authority to facilitate the interchange of interstate traffic between rail and water carriers by a less formal procedure than prevails in courts of law. We conclude that the commission had authority to make the order and that its findings were supported by the evidence.

We have fully considered other objections to the order but only one is of sufficient moment to require mention. It is argued that the jurisdiction conferred by § 6, par. 13, is limited to interstate transportation while the order directs transportation of both interstate and intrastate traffic. By the terms of this section, the commission is given jurisdiction both of the transportation described and of the carriers, rail and water, engaged in such transportation. By definition, transportation includes " . . . all instrumentalities and facilities of shipment or carriage,

irrespective of ownership . . . and all services in connection with the receipt, delivery, . . . and transfer in transit, . . . and handling of property transported," § 1, par. 3, Transportation Act, *supra*, at pp. 474–475.

The commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, we think it clear that Congress in employing such broad language as " the commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated " intended to confer upon the commission power to regulate the entire stream of commerce. Where, as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute. This was the view of the state court. *People ex rel. New York Central R. R.* v. *Public Service Commission, supra.* Cf. *State of Colorado* v. *United States,* 271 U. S. 153; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 485; *Texas & Pac. Ry.* v. *Gulf, etc., Ry.,* 270 U. S. 266. An interpretation of the statute which would in practice require the segregation of all shipments in interstate commerce would make compliance with the commission's orders impossible and defeat the purpose of the Act.

Judgment reversed.

Mr. Justice Sutherland took no part in the consideration or decision of this case.

VAN OSTER *v.* KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 303. Argued October 20, 1926.—Decided November 22, 1926.

1. The power of a State to forfeit property used in violation of its liquor prohibition laws extends to property (an automobile) of an innocent owner who entrusted its possession and use to the wrongdoer. P. 467.
2. *Semble* that there is no valid distinction rendering this police power less plenary, under the Fourteenth Amendment, than similar exercise of the federal taxing power under the Fifth Amendment. P. 468.
3. The mere fact that the state statute here in question has a broader scope than § 26 of the National Prohibition Act, authorizing confiscation of vehicles used in unlawful transportation of liquor, does not affect its validity. P. 468.
4. The Constitution does not require a jury trial of such forfeitures under state law. P. 469.
5. The sufficiency of the evidence in such proceedings, and the effect on the forfeiture of a subsequent acquittal of the offending person in a separate trial, are matters of state law. P. 469.

119 Kan. 874, affirmed.

ERROR to a judgment of the Supreme Court of Kansas affirming a judgment forfeiting an automobile, under the laws of Kansas, because of its use in the illegal transportation of intoxicating liquor.

Messrs. Duane R. Dills and *William H. Thompson,* with whom *Messrs. Wilbert F. Thompson* and *Albert A. Jones* were on the brief, for the plaintiff in error.

Mr. Roland Boynton, Assistant Attorney General of Kansas, with whom *Messrs. Charles B. Griffith,* Attorney General, and *Ray H. Calihan* were on the brief, for the State of Kansas.

MR. JUSTICE STONE delivered the opinion of the Court.

Plaintiff in error purchased an automobile of local dealers in Finney County, Kansas, agreeing, as part considera-

tion for the sale, to its retention by the vendors for use in their business. Clyde Brown, an associate of the dealers, was permitted by them, with the knowledge of plaintiff in error, to make frequent use of the automobile. Brown was arrested by state officers and an information was filed charging that he used an automobile (which was plaintiff's) for the illegal transportation of intoxicating liquor and seeking its forfeiture and sale as a common nuisance under the Kansas statute. Laws of Kansas, 1919, c. 217, §§ 1–5; §§ 21–2162 to 21–2167 R. S. Plaintiff intervened, denying the allegations of the information and setting up her ownership of the automobile and that the transportation of intoxicating liquor, if any, was without her knowledge or authority.

A trial by the District Court of Finney County without a jury, as provided by the Kansas statute, resulted in a judgment of forfeiture. This determination was affirmed on appeal to the Supreme Court of Kansas, *State* v. *Van Oster,* 119 Kan. 874. After this decision, but prior to a petition for rehearing subsequently denied, Brown was acquitted by a jury of the offense charged in the information. The case comes here on writ of error, Jud. Code, 237(a), as amended.

The Kansas statute, cited above, declares that an automobile or other vehicle used in the state in the transportation of intoxicating liquor is a common nuisance and establishes a procedure followed in this case for its forfeiture and sale. The Kansas Supreme Court in this, as in other cases, *State* v. *Peterson,* 107 Kans. 641; *State* v. *Stephens,* 109 Kan. 254, has construed this act as authorizing the forfeiture of the interest of an innocent owner or lienor in property entrusted to the wrongdoer.

It is contended that the statute as interpreted denies the due process of law guaranteed by the Fourteenth Amendment. The statute is further assailed on the ground that it is repugnant to the provisions of the National Prohi-

bition Act which covers the same field, and finally, objection is made that evidence of the intoxicating character of the liquor transported was lacking, and that the acquittal of Brown establishes beyond contradiction that no crime was committed.

It is not questioned that a state in the exercise of its police power may forfeit property used by its owner in violation of state laws prohibiting the liquor traffic, *Kidd* v. *Pearson,* 128 U. S. 1; cf. *Mugler* v. *Kansas,* 123 U. S. 623, 671, *et seq.; Lawton* v. *Steele,* 152 U. S. 133. It is unnecessary for us to inquire whether the police power of the state extends to the confiscation of the property of innocent persons appropriated and used by the law breaker without the owner's consent, for here the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle.

It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples. They have their counterpart in legislation imposing liability on owners of vehicles for the negligent operation by those entrusted with their use, regardless of a master-servant relation. Laws of New York, 1924, c. 534; Michigan Pub. Acts, 1915; Act No. 302, § 29 (constitutionality upheld, *Stapleton* v. *Independent Brewing Co.,* 198 Mich. 170). They suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as

to collusion between the wrongdoer and the alleged innocent owner. So here the legislature, to effect a purpose clearly within its power, has adopted a device consonant with recognized principles and therefore within the limits of due process.

It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505; *Dobbins Distillery* v. *United States,* 96 U. S. 395; *United States* v. *Stowell,* 133 U. S. 1; *United States* v. *Mincey,* 254 Fed. 287; *Logan* v. *United States,* 260 Fed. 746; *United States* v. *One Saxon Automobile,* 257 Fed. 251; *United States* v. *246½ Pounds of Tobacco,* 103 Fed. 791; *United States* v. *220 Patented Machines,* 99 Fed. 559; but cf. *National Bond & Investment Co.* v. *Gibson,* 6 Fed. (2d) 288. A like principle has been applied to the unlawful introduction of liquor into Indian territory in violation of § 2140, R. S. *United States* v. *One Buick Roadster Automobile,* 244 Fed. 961; *United States* v. *One Seven Passenger Paige Car,* 259 Fed. 641.

We do not perceive any valid distinction between the application of the Fourteenth Amendment to the exercise of the police power of a state in this particular field and the application of the Fifth Amendment to the similar exercise of the taxing power by the federal government, or any reason for holding that the one is not as plenary as the other. See *Hibben* v. *Smith,* 191 U. S. 310, 325; *Carroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, 410, and see *Kidd* v. *Pearson, supra,* at p. 26, upholding the police power of a state to destroy property used in the unlawful manufacture of liquor, on the authority of *Coe* v. *Errol,* 116 U. S. 517, a tax case.

The mere fact that the statute now in question has a broader scope than § 26 of the National Prohibition Act,

authorizing confiscation of vehicles used in unlawful transportation of liquor, does not affect its validity. In *Hebert* v. *State of Louisiana, ante,* p. 312, it was held that the same transaction may constitute separate offenses against both state and federal sovereignties, and that in separate prosecutions the statutes of that sovereignty under whose auspices the proceedings are instituted are alone to be applied. Cf. *United States* v. *Lanza,* 260 U. S. 377; *Vigliotti* v. *Pennsylvania,* 258 U. S. 403.

The other questions raised by the record as to the sufficiency of the evidence and the effect of the acquittal of Brown on his separate trial, at most involved questions of state procedure only as to which the decision of the state court is controlling. No tenable ground for attacking the constitutionality of the determination is suggested. In the brief and on the argument an attempt was made to question the constitutionality of the provisions of this statute dispensing with a jury trial in the forfeiture proceeding. But the record does not indicate that a jury trial was demanded and the question is not raised by the assignments of error. In any case the objection is unsubstantial. *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40; *Hurtado* v. *California,* 110 U. S. 516; *Walker* v. *Sauvinet,* 92 U. S. 90; *Kennard* v. *Louisiana ex rel. Morgan,* 92 U. S. 480.

Affirmed.

HUGHES BROTHERS TIMBER COMPANY *v.* MINNESOTA.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 170. Argued October 6, 7, 1926.—Decided November 23, 1926.

1. A State can not tax personal property which is in actual transit in interstate commerce. P. 471.

2. Pursuant to a contract of sale, logs cut in Minnesota by the vendors, were floated by river to Lake Superior, there loaded on the vendee's vessels and transported to their destination in Michigan. Part of the price was paid when provisional inspection and estimates of quantity, etc., were made by the vendee at river landings, another part when the logs reached booms at or near the place of their transferrence to the vessels, and the remainder at destination. The wood was scaled by representatives of both parties when stowed in the vessels and at destination. Liability insurance was carried by the vendor, and cargo insurance by the vendee. The vendor warranted title.

   Held, that the logs had begun their continuous interstate journey with the beginning of their drive down the river, not with their subsequent transfer to the vessels. Pp. 473, 475.

3. The contract and the method of complying with it were circumstances throwing light on the question whether the interstate transportation began at the beginning of the drive when the ice broke up, or at the point of loading in the lake. P. 473.

4. The change in the method of transportation from floating to carriage on a vessel, did not affect the continuity of the interstate passage. P. 474.

5. The interstate character of the movement of goods actually on their way from one State to another is not destroyed by the fact that the transportation is not by carrier but under control of the owner, who may divert them to another destination. P. 475.

163 Minn. 4, reversed.

CERTIORARI (269 U. S. 542) to a judgment of the Supreme Court of Minnesota which affirmed, with a modification, a judgment for taxes on personal property, recovered by the State of Minnesota in a special proceeding against the Hughes Bros. Timber Company. The tax in question was assessed on some pulp wood which the company alleged was at the time in actual transit from Minnesota to Michigan and therefore was not subject to taxation by Minnesota.

Mr. H. A. Carmichael, with whom *Messrs. Oscar Mitchell* and *W. D. Bailey* were on the brief, for the petitioner.

Mr. James E. Markham, Deputy Attorney General of Minnesota, with whom *Messrs. Clifford L. Hilton,* Attorney General, *G. A. Youngquist,* Assistant Attorney General, and *Harold H. Phelps* were on the brief, for the State of Minnesota.

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a special proceeding in the District Court of Cook County, Minnesota, by the State, through the county treasurer, to collect taxes on personal property owned by the Hughes Bros. Timber Company. With the penalty and fees and costs, the amount sued for was $2,919.50. The amount claimed by items appeared in a delinquent list furnished by the treasurer to the sheriff of the county for collection for the year 1922. It included a tax upon 10,000 cords of pulp wood of the assessed value of $21,233. In its answer as amended, the Timber Company pleaded that the pulp wood was not subject to taxation in the State of Minnesota at the time it was assessed, May 1, 1922, but was at that time in actual transit in interstate commerce by continuous route from the State of Minnesota to the State of Michigan. This presents the only question in the case.

The issue was submitted, without a jury, to the District Court, which found that the wood was not being carried in interstate commerce. The result was a judgment against the Timber Company for $2,456.78, including a penalty. The case was appealed to the Supreme Court, which held that the judgment of the District Court was wrong in the penalty imposed, because the defendants had not been given opportunity to pay the correct amount of the taxes, but with this modification affirmed the judgment of the District Court. 163 Minn. 4. The case is here by certiorari granted October 12, 1925. 269 U. S. 542.

The Timber Company was a partnership, having its office headquarters at Hovland, Cook County, Minnesota. The Swamp River flows through the county and empties into the Pigeon River. The latter forms the boundary between Cook County, Minnesota, and the Province of Ontario, Canada, and empties into Lake Superior. The Timber Company's pulp wood was cut and gathered at various places in the county, but was hauled to the Swamp River and piled up on the ice and on its banks at a point about two miles and a half above its discharge into the Pigeon River. In October, 1921, the Timber Company had made a contract with the Central Paper Company of Muskegon, Michigan. By that contract the Timber Company agreed to deliver to the Paper Company, over the rail of the Paper Company's vessels at the mouth of the Pigeon River, approximately 10,000 cords of spruce pulp wood. The Timber Company agreed to load the wood into them as promptly as possible after its arrival. The Paper Company was to give to the Timber Company three days' notice of the arrival of its vessels at the booms where the logs were held. The wood was to be scaled and measured by a representative of both parties when the first cargo was loaded, and also on arrival at Muskegon, Michigan, the measurement at Muskegon to be the basis for final settlement. The price per cord was to be $12. The Paper Company agreed to make progress estimates or provisional measurements during the months of January, February and March at river landings, and an advance of $3 per cord for all wood inspected and measured, its inspector to be properly assisted by the Timber Company. The title to the wood on which advances were made was to be in the name of the Paper Company and to be branded at the time of provisional inspection and measurement. The Paper Company agreed to advance the second 25 per cent., or $3 per cord, when the wood was delivered in the Pigeon River booms, and the balance, or $6 a cord, within five days after its delivery at Muskegon.

Liability insurance was to be carried and paid by the Timber Company, and cargo insurance was to be carried and paid for by the Paper Company. There was a warranty of title and freedom from all encumbrances, by the Timber Company.

The hauling and placing of the logs on the ice and on the banks of the Swamp River were completed the latter part of March. When the ice broke, April 29, 1922, the drive of the logs began; those on the ice moved of themselves, and those on the banks were pushed in. The drive was conducted by the Timber Company's men. It had lasted eighteen days when the logs reached the Pigeon River booms. By the latter part of July, all the logs had been shipped by vessels of the Paper Company on the lake to Muskegon.

We do not think it important, for purposes of this case, to decide where the title to the timber was at the time the drive began. The Paper Company had an interest in the timber and so had the Timber Company. Although the point was at first made by the Timber Company that the logs were not taxable in the name of the Timber Company, May 1, 1922, the day fixed as the tax day, that point is not pressed. The contract and the method of complying with it are all circumstances, however, throwing light on the question whether the transportation in interstate commerce began at the beginning of the drive, when the ice broke up, or at the point of loading on the lake.

The Timber Company was under contract to float the timber down from the place of piling on the Swamp River and deliver it as promptly as possible. The Paper Company by payment of $3.00 a ton had acquired a qualified ownership in the timber even before it was segregated and put to float. Had the Timber Company or some one claiming under it attempted to stop the drive after it had begun, and interfered with the passage of the timber

down the Swamp or Pigeon River, it would have been a breach of the contract of sale. All this characterizes what was being done in the drive between the Swamp River entrepot and the mouth of the Pigeon River. That was the beginning or first leg of the interstate journey. The obligations of both parties accorded with that view. The change in the method of transportation by floating to carriage on a vessel did not affect the continuity of the interstate passage, if such a passage was intended by the parties and had begun, any more than did shipment by local railroad bills of lading from a point in a State to a port of the same State, for shipment by vessel to a foreign port, prevent its being interstate or foreign commerce. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington,* 225 U. S. 101; *Texas, etc., R. R. Co.* v. *Sabine Tram Company,* 227 U. S. 111; *R. R. Commission* v. *Texas & Pacific Ry. Co.,* 229 U. S. 336; *Philadelphia & Reading Ry. Co.* v. *Hancock,* 253 U. S. 284, 286; *B. & O. S. W. R. R. Co.* v. *Seattle,* 260 U. S. 166, 170; *Spaulding & Bros.* v. *Edwards,* 262 U. S. 66, 70.

The case seems to us to come within the ruling of this Court in the case of *Champlain Company* v. *The Town of Brattleboro,* 260 U. S. 366. That was a tax case like this. There the owner had cut pulp wood in several towns in Vermont. The wood was placed upon the banks of the West River and its tributaries, to be floated down into the Connecticut River and thence to its destination at the mill of the owner in Hinsdale on the New Hampshire side of the river. Four thousand of the cords had been floated down the West River on the high water and reached a boom at the mouth of the West River, but it was thought not safe, in view of the high water, then to let the wood into the Connecticut. It was contended that the logs which were held in the boom at the mouth of the West River were taxable there. We held otherwise; that the interstate journey of the logs had already begun when

the boom was reached, that the boom was not a depot for the gathering of logs preparatory for the final journey, that it was a safety appliance in the course of the final journey, a harbor of refuge from danger to a shipment on its way; that it was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood in New Hampshire on the other side of the Connecticut River.

This Court distinguished the facts in that case from the facts in the main case discussed in *Coe* v. *Errol*, 116 U. S. 517, as they can be distinguished here. It is clear that the entrepot or depot for the interstate shipment of logs was in the Swamp River. The drive in the two rivers, though under the direction of the Timber Company, was not gathering the logs for subsequent interstate shipment; it was the interstate movement itself. Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation by which the logs were carried from a place in one State to a place agreed upon in another.

The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the State does not put them in interstate commerce, nor does preparatory gathering, for that purpose, at a depot. It must appear that the movement for another State has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another State. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination, as in the *Champlain Company* case. The character of the shipment in such a case de-

pends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the *Champlain* case. Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee, who, by the agreement of sale, divided with him the responsibility for the continuous interstate transportation.

The judgment of the Supreme Court of Minnesota is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.

UNITED STATES *v.* GENERAL ELECTRIC COMPANY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 113. Argued October 13, 1926.—Decided November 23, 1926.

1. Through a system of contracts between a company, which owned the patents for electric lamps with tungsten filaments and manufactured most of those sold, and a large number of wholesale and retail dealers in electrical supplies, the dealers were appointed agents of the company to sell, on commission, the lamps, which were to be consigned to them by the company, transportation prepaid; the sales were to be at prices fixed by the company; the dealers to pay all expenses except the original transportation, and to account to the company periodically for the amount, less commission, of all sales, cash or credit; and all the stock entrusted to the dealers was to remain the property of the company until sold, and to be accounted for by the dealers.

Held, that the dealers were genuine agents, not purchasers in disguise; and that the plan was not a device to fix prices after sale and to restrain trade and exercise monopoly in the lamps, in violation of the Anti-Trust Act. P. 484.

2. The circumstance that the agents were in their regular business merchants and under a prior arrangement had bought the lamps and sold them as their own, did not prevent this change in their relation to the company. P. 484.

3. Nor did the size and comprehensiveness of the scheme bring it within the Anti-Trust Law. P. 485.

4. As a patentee has a statutory monopoly of the right to make, use, and sell the patented articles, the comprehensiveness of his control of the business of selling is not necessarily an evidence of illegality in method. P. 485.

5. As long as a patentee makes no effort to fasten upon ownership of the articles he sells control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly. P. 485.

6. The owner of articles, patented or otherwise, is not violating the common law or the Anti-Trust law by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer. P. 488.

7. A patentee, in licensing another person to make, use, and vend, may lawfully impose the condition that sales by the licensee shall be at prices fixed by the licensor and subject to change at his discretion. P. 488.

15 F. (2d) 715, affirmed.

APPEAL from a decree of the District Court dismissing, for want of equity, a bill brought by the United States to enjoin the General Electric Company, Westinghouse Electric and Manufacturing Company, and Westinghouse Lamp Company, appellees herein, from prosecuting a plan for the distribution and sale of patented electric lamps, which was alleged to be a restraint and monopoly of interstate commerce.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell, Assistant*

to the Attorney General Donovan, and *Mr. Abram F. Myers,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Charles Neave, with whom *Messrs. Frederick P. Fish, Newton D. Baker, Charles W. Appleton,* and *Howard A. Couse* were on the brief, for the General Electric Company.

Mr. Frederick H. Wood, with whom *Messrs. Paul D. Cravath, F. Harold Smith,* and *Donald C. Swatland* were on the brief, for the Westinghouse Electric & Manufacturing Company.

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a bill in equity brought by the United States in the District Court for the Northern District of Ohio to enjoin the General Electric Company, the Westinghouse Electric and Manufacturing Company, and the Westinghouse Lamp Company from further violation of the Anti-Trust Act of July 2, 1890. 26 Stat. 209, c. 647. The bill made two charges, one that the General Electric Company in its business of making and selling incandescent electric lights had devised and was carrying out a plan for their distribution throughout the United States by a number of so-called agents, exceeding 21,000, to restrain interstate trade in such lamps and to exercise a monopoly of the sale thereof; and, second, that it was achieving the same illegal purpose through a contract of license with the defendants, the Westinghouse Electric and Manufacturing Company and the Westinghouse Lamp Company. As the Westinghouse Lamp Company is a corporation all of whose stock is owned by the Westinghouse Electric and Manufacturing Company, and is but its selling agent, we may treat the two as one, and reference hereafter will be only to the defendants the General Elec-

tric Company, which we shall call the Electric Company, and the Westinghouse Company.

The Government alleged that the system of distribution adopted was merely a device to enable the Electric Company to fix the resale prices of lamps in the hands of purchasers, that the so-called agents were in fact wholesale and retail merchants, and the lamps passed through the ordinary channels of commerce in the ordinary way, and that the restraint was the same and just as unlawful as if the so-called agents were avowed purchasers handling the lamps under resale price agreements. The Electric Company answered that its distributors were *bona fide* agents, that it had the legal right to market its lamps and pass them directly to the consumer by such agents, and at prices and by a system prescribed by it and agreed upon between it and its agents, there being no limitation sought as to resale prices upon those who purchased from such agents.

The second question in the case involves the validity of a license granted March 1, 1912, by the Electric Company to the Westinghouse Company to make, use and sell lamps under the patents owned by the former. It was charged that the license in effect provided that the Westinghouse Company would follow prices and terms of sales from time to time fixed by the Electric Company and observed by it, and that the Westinghouse Company would, with regard to lamps manufactured by it under the license, adopt and maintain the same conditions of sale as observed by the Electric Company in the distribution of lamps manufactured by it.

The District Court upon a full hearing dismissed the bill for want of equity and this is an appeal under § 2 of the Act of February 11, 1903, known as the Expediting Act. 32 Stat. 823, c. 544, § 2.

There had been a prior litigation between the United States and the three defendants and thirty-two other cor-

porations, in which the Government sued to dissolve an illegal combination in restraint of interstate commerce in electric lamps, in violation of the Anti-Trust Act, and to enjoin further violation. A consent decree was entered in that cause by which the combination was dissolved, the subsidiary corporations surrendered their charters, and their properties were taken over by the General Electric Company. The defendants were all enjoined from fixing resale prices for purchasers, except that the owner of the patents was permitted to fix the prices at which a licensee should sell lamps manufactured by it under the patent. After the decree was entered, a new sales plan, which was the one here complained of, was submitted to the Attorney General. The Attorney General declined to express an opinion as to its legality. The plan was adopted and has been in operation since 1912.

The Government insists that these circumstances tend to support the Government's view that the new plan was a mere evasion of the restrictions of the decree and was intended to carry out the same evil result that had been condemned in the prior litigation. There is really no conflict of testimony, in the sense of a variation as to the facts, but only a difference as to the inference to be drawn therefrom. The evidence is all included in a stipulation as to certain facts, as to what certain witnesses for the defendants would testify, and as to the written contracts of license and agency made by the Electric Company and the Westinghouse Company.

The Electric Company is the owner of three patents—one of 1912 to Just & Hanaman, the basic patent for the use of Tungsten filaments in the manufacture of electric lamps; the Coolidge patent of 1913, covering a process of manufacturing tungsten filaments by which their tensile strength and endurance are greatly increased; and, third, the Langmuir patent of 1916, which is for the use of gas in the bulb by which the intensity of the

light is substantially heightened. These three patents cover completely the making of the modern electric lights with the tungsten filaments, and secure to the Electric Company the monopoly of their making, using and vending.

The total business in electric lights for the year 1921 was $68,300,000, and the relative percentages of business done by the companies were, Electric 69 per cent., Westinghouse, 16 per cent., other licensees, 8 per cent., and manufacturers not licensed, 7 per cent. The plan of distribution by the Electric Company divides the trade into three classes. The first class is that of sales to large consumers readily reached by the Electric Company, negotiated by its own salaried employees and the deliveries made from its own factories and warehouses. The second class is of sales to large consumers under contracts with the Electric Company, negotiated by agents, the deliveries being made from stock in the custody of the agents; and the third is of the sales to general consumers by agents under similar contracts. The agents under the second class are called B agents, and the agents under the third class are called A agents. Each B agent is appointed by the Electric Company by the execution and delivery of a contract for the appointment, which lasts a year from a stated date, unless sooner terminated. It provides that the company is to maintain on consignment in the custody of the agent a stock of lamps, the sizes, types, classes and quantity of which, and the length of time which they are to remain in stock, to be determined by the company. The lamps consigned to the agents are to be kept in their respective places of business where they may be readily inspected and identified by the company. The consigned stock or any part of it is to be returned to the company as it may direct. The agent is to keep account books and records giving the complete information as to his dealings for the inspec-

tion of the company. All of the lamps in such consigned stock are to be and remain the property of the company until the lamps are sold, and the proceeds of all lamps are to be held in trust for the benefit and for the account of the company until fully accounted for. The B agent is authorized to deal with the lamps on consignment with him in three ways—first to distribute the lamps to the company's A agents as authorized by the company; second, to sell lamps from the stock to any consumer to the extent of his requirements for immediate delivery at prices specified by the company; third, to deliver lamps from the stock to any purchaser under written contract with the company to whom the B agent may be authorized by the company to deliver lamps at the prices and on the terms stated in the contract. The B agent has no authority to dispose of any of the lamps except as above provided and is not to control or attempt to control prices at which any purchaser shall sell any of such lamps. The agent is to pay all expenses in the storage, cartage, transportation, handling, sale and distribution of lamps, and all expenses incident thereto and to the accounting therefor and to the collection of accounts created. This transportation does not include the freight for the lamps in the consignment from the company to the agent. The agent guarantees the return to the company of all unsold lamps in the custody of the agent within a certain time after the termination of his agency. The agent is to pay over to the company, not later than the 15th of each month, an amount equal to the total sales value, less the agent's compensation, of all of the company's lamps sold by him,—that is, first, of the collections that have been made, second of those customers' accounts which are past due. This is to comply with the guaranty of the agent of due and prompt payment for all lamps sold by him from his stock. Third, the agent is to pay to the company the value of all of the company's

lamps lost or missing from or damaged in the stock in his custody. There is a basic rate of commission payable to the agent, and there are certain special supplemental and additional compensations for prompt and efficient service. If the agent becomes insolvent, or fails to make reports and remittances, or fails in any of his obligations, the appointment may be terminated; and, when terminated, either at the end of the year or otherwise, the consigned lamps remaining unsold are to be delivered to the manufacturer. It appears in the evidence that since 1915, although there is no specific agreement to this effect, the company has assumed all risk of fire, flood, obsolescence, and price decline, and carries whatever insurance is carried on the stocks of lamps in the hands of its agents, and pays whatever taxes are assessed. This is relevant as a circumstance to confirm the view that the so-called relation of agent to the company is the real one. There are 400 of the B agents, the large distributors. They recommend to the company efficient and reliable distributors, in the localities with which they are respectively familiar, to act as A agents whom the company appoints. There are 21,000 or more of the A agents. They are usually retail electrical supply dealers in smaller places. The only sales which the A agent is authorized to make are to consumers for immediate delivery and to purchasers under written contract with the manufacturer, just as in the case of the B agents. The plan was of course devised for the purpose of enabling the company to deal directly with consumers and purchasers, and doubtless was intended to avoid selling the lamps owned by the company to jobbers or dealers, and prevent sale by these middle men to consumers at different and competing prices. The question is whether, in view of the arrangements, made by the company with those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public,—such persons

are to be treated as agents, or as owners of the lamps consigned to them under such contracts. If they are to be regarded really as purchasers, then the restriction as to the prices at which the sales are to be made is a restraint of trade and a violation of the Anti-Trust law.

We find nothing in the form of the contracts and the practice under them which makes the so-called B and A agents anything more than genuine agents of the company, or the delivery of the stock to each agent anything more than a consignment to the agent for his custody and sale as such. He is not obliged to pay over money for the stock held by him until it is sold. As he guarantees the account when made, he must turn over what should have been paid whether he gets it or not. This term occurs in a frequent form of pure agency known as sale by *del credere* commission. There is no conflict in the agent's obligation to account for all lamps lost, missing or damaged in the stock. It is only a reasonable provision to secure his careful handling of the goods entrusted to him. We find nothing in his agreement to pay the expense of storage, cartage, transportation (except the freight on the original consignment), handling and the sale and distribution of the lamps, inconsistent with his relation as agent. The expense of this is of course covered in the amount of his fixed commission. The agent has no power to deal with the lamps in any way inconsistent with the ownership of the lamps retained by the company. When they are delivered by him to the purchasers, the title passes directly from the company to those purchasers. There is no evidence that any purchaser from the company, or any of its agents, is put under any obligation to sell at any price or to deal with the lamps purchased except as an independent owner. The circumstance that the agents were in their regular business wholesale or retail merchants, and under a prior arrangement had bought the lamps, and sold them as

their owners, did not prevent a change in their relation to the company. We find no reason in this record to hold that the change in this case was not in good faith and actually maintained.

But it is said that the system of distribution is so complicated and involves such a very large number of agents distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Anti-Trust law. We do not question that in a suit under the Anti-Trust Act the circumstance that the combination effected secures domination of so large a part of the business affected as to control prices is usually most important in proof of a monopoly violating the Act. But under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article. The extent of his monopoly in the articles sold and in the territory of the United States where sold is not limited in the grant of his patent, and the comprehensiveness of his control of the business in the sale of the patented article is not necessarily an indication of illegality of his method. As long as he makes no effort to fasten upon ownership of the articles he sells control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly. It is only when he adopts a combination with others, by which he steps out of the scope of his patent rights and seeks to control and restrain those to whom he has sold his patented articles in their subsequent disposition of what is theirs, that he comes within the operation of the Anti-Trust Act. The validity of the Electric Company's scheme of distribution of its electric lamps turns, therefore, on the question whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment. The distinction in law and fact between an agency and a sale is clear. For the reasons already stated, we find no

ground for inference that the contracts made between the company and its agents are, or were intended to be, other than what their language makes them.

The Government relies in its contention for a different conclusion on the case of *Dr. Miles Medical Company* v. *John D. Park & Sons Company;* 220 U. S. 373. That case was a bill in equity brought by the Miles Medical Company to enjoin Park & Sons Company from continuing an alleged conspiracy with a number of wholesale and retail dealers in proprietary medicines, to induce the persons who had entered into certain agency contracts, to the number of 21,000 through the country, to break their contracts of agency with the Medical Company, to the great injury of that company. The agency concerned the sale of proprietary medicines prepared by secret methods and formulas and identified by distinctive packages and trademarks. The company had an extensive trade throughout the United States and certain foreign countries. It had been its practice to sell its medicines to jobbers and wholesale druggists, who in turn sold to retail druggists for sale to the customer. It had fixed not only the price of its own sales to jobbers and wholesale dealers but also the prices of jobbers and small dealers. The defendants had inaugurated a cut-rate or cut-price system which had caused great damage to the complainant's business, injuriously affected its reputation and depleted the sales of its remedies. The bill was demurred to, on the ground that the methods set forth in the bill, by which attempt was made to control the sales or prices to consumers, was illegal both at common law and under the Anti-Trust Act, and deprived the bill of any equity. This was the issue considered by the Court.

The plan of distribution of the Miles Medical Company resembled in many details the plan of distribution in the present case, except that the subject matter there was medicine by a secret formula, and not a patented article.

But there were certain vital differences. These led the Circuit Court of Appeals (164 Fed. 803) to declare that the language of the so-called contracts of agency was false in its purport, and merely used to conceal what were really sales to the so-called agents. This conclusion was sustained by certain allegations in the bill inconsistent with the contracts of agency, to the effect that the Medical Company did sell to these so-called agents the medical packages consigned. This Court, however, without reference to these telltale allegations of the bill, found in the contracts themselves and their operation plain provision for purchases by the so-called agents, which necessarily made the contracts, as to an indefinite amount of the consignments to them, contracts of sale rather than of agency. The Court therefore held that the showing made was of an attempt by the Miles Medical Company, through its plan of distribution, to hold its purchasers, after the purchase at full price, to an obligation to maintain prices on a resale by them. This is the whole effect of the *Miles Medical* case. That such it was is made plain in the case of *Boston Store* v. *American Graphophone Company*, 246 U. S. 8, 21, in which then Chief Justice White reviewed the various cases on this general subject and spoke of the *Miles Medical* case as follows:

"In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373, it was decided that under the general law the owner of movables (in that case, proprietary medicines compounded by a secret formula) could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables.

It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Anti-Trust Law."

Nor does the case of the *Standard Sanitary Manufacturing Company* v. *United States,* 226 U. S. 20, sustain the contention of the Government on the first question. There a number of manufacturers, one of whom owned a patent for enameled iron ware for plumbing fixtures, made a combination to accept licenses to make the patented commodities and to sell them in interstate trade to jobbers, and to refuse to sell to jobbers who would not agree to maintain fixed prices in sales to plumbers. This was an attempt just like that in the *Miles Medical Company* case, to control the trade in the articles sold and fasten upon purchasers, who had bought at full price and were complete owners, an obligation to maintain resale prices.

We are of opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer. The first charge in the bill can not be sustained.

Second. Had the Electric Company, as the owner of the patents entirely controlling the manufacture, use and sale of the tungsten incandescent lamps, in its license to the Westinghouse Company, the right to impose the condition that its sales should be at prices fixed by the licensor and subject to change according to its discretion? The contention is also made that the license required the Westinghouse Company not only to conform in the matter

of the prices at which it might vend the patented articles, but also to follow the same plan as that which we have already explained the Electric Company adopted in its distribution. It does not appear that this provision was express in the license, because no such plan was set out therein; but even if the construction urged by the Government is correct, we think the result must be the same.

The owner of a patent may assign it to another and convey, (1) the exclusive right to make, use and vend the invention throughout the United States, or, (2) an undivided part or share of that exclusive right, or (3) the exclusive right under the patent within and through a specific part of the United States. But any assignment or transfer short of one of these is a license, giving the licensee no title in the patent and no right to sue at law in his own name for an infringement. *Waterman* v. *Mackenzie,* 138 U. S. 252, 255; *Gayler* v. *Wilder,* 10 How. 477, 494, 495; *Moore* v. *Marsh,* 7 Wall. 515, and *Crown Company* v. *Nye Tool Works,* 261 U. S. 24, 30. Conveying less than title to the patent, or part of it, the patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure. It is well settled, as already said, that where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase. It has passed beyond the scope of the patentee's rights. *Adams* v. *Burke,* 17 Wall. 453; *Bloomer* v. *McQuewan,* 14 How. 539; *Mitchell* v. *Hawley,* 16 Wall. 544; *Hobbie* v. *Jennison,* 149 U. S. 355; *Keeler* v. *Standard Folding Bed Co.,* 157 U. S. 659. But the question is a different one which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in the

exercise of the right to sell. The patentee may make and grant a license to another to make and use the patented articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them, he infringes the right of the patentee, and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself." He does not thereby sell outright to the licensee the articles the latter may make and sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell.

This question was considered by this Court in the case of *Bement* v. *National Harrow Company*, 186 U. S. 70. A combination of manufacturers owning a patent to make float spring tool harrows, licensed others to make and sell the products under the patent, on condition that they would not during the continuance of the license sell the products at a less price, or on more favorable terms of payment and delivery to purchasers, than were set forth

in a schedule made part of the license. That was held to be a valid use of the patent rights of the owners of the patent. It was objected that this made for a monopoly. The Court, speaking by Mr. Justice Peckham, said (p. 91):

"The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Speaking of the contract, he said (p. 93):

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

The question which the Court had before it in that case came to it on a writ of error to the Court of Appeals of New York, and raised the federal issue whether a contract of license of this kind, having a wide operation in the sales of the harrows, was invalid because a violation of the Anti-Trust law. This Court held that it was not.

It is argued, however, that *Bement* v. *National Harrow Company* has been in effect overruled. The claim is based on the fact that one of the cases cited by Mr. Justice Peckham in that case was *Heaton-Peninsula Button-Fastener Company* v. *Eureka Specialty Company*, 77 Fed.

288. This was a decision by the Circuit Court of Appeals of the Sixth Circuit, the opinion being written by Circuit Judge Lurton, afterwards a Justice of this Court. The question there considered was whether the owner of a patent for a machine for fastening buttons to shoes with metallic fasteners might sell such machines subject to the condition that they should be used only with fasteners manufactured by the seller, the patented machine to revert on the breach of the condition. The purchaser of the machine was held to be a licensee and the use by him of the unpatented fasteners contrary to the condition to be a breach of contract of the license and an infringement of the patent monopoly.

A similar case came before this Court and is reported in *Henry* v. *Dick Company*, 224 U. S. 1, the opinion in which was also delivered by Mr. Justice Lurton. In that case, a complainant sold his patented machine embodying his invention. It was called the "Rotary Mimeograph." The claims of the patent did not embrace ink or other materials used in working it. Upon the machine, however, was inscribed a notice, styled a License Restriction, reciting that the machine might be used only with the stencil paper, ink and other supplies made by the A. B. Dick Company. The Henry Company, dealers in ink, sold to the purchaser, for use in working her machine, ink not made by the Dick Company. This Court held by a majority that the use of such ink by the purchaser was a prohibited use and rendered her liable to an action under the patent law for infringement, and that the seller of the ink was liable as a contributory infringer.

The case was overruled by this Court in the *Motion Picture Patents Company* v. *Universal Film Company*, 243 U. S. 502. The patent in that case covered a part of the mechanism used in motion picture exhibiting machines for feeding a film through the machine with a regular, uniform and accurate movement, so as not to expose

the film to excessive strain or wear. The license agreement contained a covenant on the part of the licensee, that every machine sold by it should be sold under the restriction and condition that such exhibiting or projecting machines should be used solely for exhibiting or projecting motion pictures of the Motion Picture Patents Company. The overruling of the *Dick* case was based on the ground that the grant of the patent was of the exclusive right to use the mechanism and produce the result with any appropriate material, and that the materials or pictures upon which the machine was operated were no part of the patented machine, or of the combination which produced the patented result.

The overruling of the *Dick* case and the disapproval of the *Button-Fastener* case by the *Motion Picture Film* case did not carry with it the overruling of *Bement* v. *Harrow Company*. The *Button-Fastener* case was cited in the case of *Bement* v. *Harrow Company* to sustain the decision there by what was an *a fortiori* argument. The ruling in the former case was much broader than was needed for the decision in the latter. The price at which a patented article sells is certainly a circumstance having a more direct relation, and is more germane to the rights of the patentee, than the unpatented material with which the patented article may be used. Indeed, as already said, price fixing is usually the essence of that which secures proper reward to the patentee.

Nor do we think that the decisions of this Court holding restrictions as to price of patented articles invalid, apply to a contract of license like the one in this case. Those cases are: *Boston Store* v. *American Graphophone Company*, 246 U. S. 8; *Straus* v. *Victor Talking Machine Company*, 243 U. S. 490; *Bauer* v. *O'Donnell*, 229 U. S. 1; *Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20; *Bobbs-Merrill Company* v. *Straus*, 210 U. S. 339. These cases really are only instances of

the application of the principle of *Adams* v. *Burke,* 17 Wall. 453, 456, already referred to, that a patentee may not attach to the article made by him, or with his consent, a condition running with the article in the hands of purchasers, limiting the price at which one who becomes its owner for full consideration shall part with it. They do not consider or condemn a restriction put by a patentee upon his licensee as to the prices at which the latter shall sell articles which he makes and only can make legally under the license. The authority of *Bement* v. *Harrow Company* has not been shaken by the cases we have reviewed.

For the reasons given, we sustain the validity of the license granted by the Electric Company to the Westinghouse Company. The decree of the District Court dismissing the bill is

Affirmed.

HANOVER FIRE INSURANCE COMPANY *v.* HARDING, COUNTY TREASURER.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 179. Argued October 18, 1926.—Decided November 23, 1926.

1. While a State may forbid a foreign corporation to do business within its jurisdiction, or to continue it, and may fix conditions under which the exercise of the privilege may be allowed, it may not do so by imposing upon the corporation a sacrifice of its rights under the Federal Constitution. Pp. 507, 509.
2. At the end of the period for which a license to do local business has been granted to a foreign corporation, the State may impose as a condition precedent to a renewed license that its valid laws shall have been complied with in the past. P. 514.
3. But the State may not make past compliance with an unconstitutional tax a condition precedent to renewal of the license. P. 514.
4. A decision of a state Supreme Court construing a local law taxing foreign corporations as imposing a privilege tax rather than a property tax, is binding on this Court; but this Court, in deter-

mining the applicability of the equal protection clause of the Fourteenth Amendment, must decide, independently, whether the tax is part of the condition upon which admission to do business in the State is permitted and is merely a regulating license by the State to protect the State and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the State as they are made by other taxpayers of the State. Pp. 509, 511.

5. A foreign corporation which is duly admitted to do business in a State is to be classified with similar domestic corporations in testing the equality of the laws enacted for the purpose of raising revenue. P. 511.

6. An Illinois tax on the local net receipts of foreign insurance companies was long construed and applied as a tax on personal property; and, like other personal property taxes, partly by law and partly by custom, was assessed on only 30% of the full value; but afterwards, by a change of construction, it was held to be an occupation or privilege tax, laid on such corporations annually, as a condition to their right to do business in Illinois; with the result that all of their local net income was taxed at the rate applicable to personal property, while domestic corporations of the same class and engaged in the same kinds of business paid only a tax on their personal property, assessed at the reduced valuation. *Held* a discrimination which denied the equal protection of the laws to a foreign corporation which had renewed its license in Illinois from year to year, built up a large business and good will in that State, and had many agents there and extensive records containing information concerning its policies and policyholders. P. 516.

317 Ill. 366, reversed.

ERROR to a judgment of the Supreme Court of Illinois which affirmed a judgment dismissing the bill of the Insurance Company, a New York corporation, against Carr, the treasurer and tax collector of Cook County, Illinois. The bill prayed an injunction to prevent distraint of the plaintiff's property under a warrant for taxes due under an Illinois law which the bill challenged as unconstitutional under the state constitution and the equal protection clause of the Fourteenth Amendment. Harding, treasurer of Cook County, was substituted in thi Court for Carr, his predecessor in office.

Mr. Charles E. Hughes, with whom *Messrs. Charles S. Deneen, Robert J. Folonie,* and *Frederick D. Silber* were on the brief, for plaintiff in error.

This Court, ascertaining from the decisions of the state court and from the admitted facts in the pleadings what is the operation of the Act, will determine for itself whether, in view of such operation, it infringes the Constitution. *Truax* v. *Corrigan,* 257 U. S. 312; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *St. Louis Cotton Co.* v. *Arkansas,* 260 U. S. 346; *Crew-Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Choctaw R. Co.* v. *Harrison,* 235 U. S. 292; *Pullman Co.* v. *Kansas,* 216 U. S. 56. If the operation of the law infringes upon guaranties under the Fourteenth Amendment to the Constitution, it may not be validated by claims of waiver upon entry of plaintiff into the State or by claim of sovereign right to exclude foreign corporations. *Pullman Co.* v. *Kansas, supra; Terral* v. *Burke Const. Co.,* 257 U. S. 529; *Frost* v. *R. R. Comm.,* 271 U. S. 583; *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535.

Upon its face, § 30 of the Act of March 11, 1869, is a revenue measure imposing taxes upon property. The history of the Act, as well as its context, demonstrates that it was intended to lay a property tax and it has been consistently so administered. It was originally enacted as part of a revenue act for taxing property generally.

The tax has repeatedly been declared to be a property tax by the courts of Illinois. *Walker* v. *Springfield,* 94 Ill. 364; *Chicago* v. *Phoenix Ins. Co.,* 126 Ill. 276; *People* v. *Cosmopolitan Ins. Co.,* 246 Ill. 442. The statutes upon compliance with which insurance companies are permitted to do business in Illinois are distinct and independent enactments. The courts of Illinois have repeatedly declared that the tax here under consideration is to be administered and applied exactly as taxes upon other property. *Walker* v. *Springfield, supra; Chicago* v. *James,* 114 Ill. 479;

Chicago v. *Phoenix Ins. Co., supra; People* v. *Cosmopolitan Ins. Co., supra.*

The provisions of § 30 of the Act of March 11, 1869, are not conditions precedent to doing business in the State. *Fidelity Co.* v. *Board of Review,* 264 Ill. 11. The net receipts subject to taxation are personal property, and a tax thereon is a personal tax. *People* v. *Kent,* 300 Ill. 324. The provisions of § 30 are not a condition for the doing of business in Illinois by foreign insurance companies. *People* v. *Barrett,* 309 Ill. 53. The exaction is a tax imposed after the business has been done. The tax is designed to be "in lieu of the taxes that would otherwise be realized from such net receipts as are taken away." *Hanover Ins. Co.* v. *Carr,* 317 Ill. 366. The tax is declared to be a "business tax" and therefore is not a privilege tax imposed as a condition for entry into the State. It is an exaction for raising revenue for maintenance of the government. *Hanover Ins. Co.* v. *Carr, supra.* An occupation tax must operate alike on all persons and corporations engaged in the insurance business, otherwise it denies the equal protection of the laws. *Hanover Ins. Co.* v. *Carr, supra,* (dissenting opinion); *Nebraska Tel. Co.* v. *City,* 82 Neb. 59.

A consideration of the general principles applicable to a tax of the type here for review shows that it is a tax upon property subject to incidents of property taxation. It has none of the attributes of a license tax, and all of the attributes of a property tax. *People* v. *Cosmopolitan Ins. Co., supra; Thompson* v. *McLeod,* 112 Miss. 383; *Thompson* v. *Kreutzer,* 112 Miss. 165; *Brown* v. *Maryland,* 12 Wheat 444; *Phoenix Ins. Co.* v. *Omaha,* 23 Neb. 312; *New York Ins. Co.* v. *Bradley,* 83 S. C. 418; *Parker* v. *North British Ins. Co.,* 42 La. Ann. 428. The tax being one for revenue is none the less of that character because it incidentally burdens a class of business. *Bailey* v. *Drexel Co.,* 259 U. S. 20.

Taxation of the net receipts of plaintiff in error at full value, whereas other personal property was systematically and intentionally valued for assessment purposes at less than full value, operates as a denial of the equal protection of the laws. *Sioux City Bridge Co.* v. *Dakota County*, 265 U. S. 441.

The unconstitutional action of the taxing bodies, approved by the Supreme Court of Illinois, in denying the equal protection of the law to plaintiff in error, makes the tax levy and exaction illegal even if the statute be constitutional. *Greene* v. *Louisville R. R. Co.*, 244 U. S. 499; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362; *Tank Car Corp.* v. *Day*, 270 U. S. 367; *Myles Salt Co.* v. *Drainage Dist.*, 239 U. S. 478. Equal protection of the law is not satisfied by uniformity of tax rate where uniformity of valuation is lacking. *Greene* v. *Louisville R. R. Co.*, *supra*; *Cummings* v. *Merch. Nat. Bank*, 101 U. S. 153; *Exchange Bank* v. *Hines*, 3 Oh. St. 1; *People* v. *Purdy*, 231 U. S. 373.

If the tax be considered as an excise tax upon occupation or business, it is unconstitutional as administered and applied. It is unlawful for Illinois to impose conditions for the doing of business, in derogation of the guaranties of the Fourteenth Amendment. *Western Union Tel. Co.* v. *Kansas*, *supra*; *Fidelity Co.* v. *Tafoya*, 270 U. S. 426; *Frost* v. *R. R. Comm.*, *supra*; *Doyle* v. *Continental Ins. Co.*, *supra*. Plaintiff in error, having complied with all conditions precedent to entry into the State, thereby became domiciled to such an extent that, after being so lawfully in the State, it was entitled to equal protection of the laws. *Home Mining Co.* v. *New York*, 143 U. S. 305; *Erie R. R. Co.* v. *State*, 31 N. J. L. 542; Judson, Taxation, 2d ed., § 178; Waterman, Corporations, vol. 2, p. 283.

The imposition of a business tax whereby one in the business is burdened in a much greater degree than others

engaged in the same business denies equal protection of the laws. *Cotting* v. *Goddard,* 183 U. S. 79; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400; *Berry* v. *City,* 320 Ill. 536; *Chalker* v. *Birmingham Ry. Co.,* 249 U. S. 522; *Truax* v. *Corrigan,* 257 U. S. 312; *Magoun* v. *Illinois Bank,* 170 U. S. 283. The classification made by the statute, as construed by the Supreme Court of Illinois, is arbitrary and illusory and has no fair or substantial relation to the proper objects sought to be accomplished by the legislature. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412. See also *Mutual Life Assn.* v. *Augusta,* 109 Ga. 79; *Wright* v. *Southern Tel. Co.,* 127 Ga. 227; *Pullman Co.* v. *State,* 64 Tex. 274.

Messrs. Benson Landon and *Leon Hornstein,* with whom *Messrs. Francis X. Busch, Hiram T. Gilbert, Clair E. More,* and *Harris F. Williams* were on the brief, for defendant in error.

The State of Illinois had the right to prescribe the terms and conditions upon which plaintiff in error might transact business within the borders of the State. *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall. 566; *Fire Assn.* v. *New York,* 119 U. S. 110; *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181; *Crutcher* v. *Kentucky,* 141 U. S. 47; *Horn Mining Co.* v. *New York,* 143 U. S. 305; *Hooper* v. *California,* 155 U. S. 648; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217; *Oliver Mining Co.* v. *Lord,* 262 U. S. 173; *St. Louis Cotton Co.* v. *Arkansas,* 260 U. S. 346; *Clement Bank* v. *Vermont,* 231 U. S. 120; *Truax* v. *Corrigan,* 257 U. S. 312. Whether the tax in question is a privilege tax or a property tax is immaterial. The State may impose upon a foreign corporation a property tax different from that imposed upon a domestic corporation.

The validity of the tax, or its character, is not determined by the mode adopted in fixing its amount. *Horn Mining Co.* v. *New York, supra; Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *Maine* v. *Grand Trunk, supra; Home Ins. Co.* v. *New York,* 134 U. S. 594.

The decision of the Supreme Court of Illinois that the tax provided for by § 30 of the Act of 1869 is required to be extended against the entire amount of net receipts, being a construction of a statute of that State, is binding upon this Court and furnishes no ground of relief to the complainant. *People* v. *Kent,* 300 Ill. 324; *People* v. *Barrett,* 309 Ill. 53; *Hanover Ins. Co.* v. *Carr,* 317 Ill. 366; *Truax* v. *Corrigan,* 257 U. S. 312; *St. Louis Cotton Co.* v. *Arkansas, supra;* Illinois Constitution, Art. X, § 1.

The Casualty Insurance Company Act does not operate to nullify § 30 of the Act of 1869, the State having power to discriminate between the different classes of companies. *Northwestern Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *Ohio Tax Cases,* 232 U. S. 576; *Armour Co.* v. *Lacey,* 200 U. S. 226; *Singer Co.* v. *Bricknell,* 233 U. S. 304; *Connolly* v. *Union Pipe Co.,* 184 U. S. 540; *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532; *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114.

The Privilege Act of 1919 does not affect § 30 of the Act of 1869. *Horn Mining Co.* v. *New York, supra; Cheney Bros. Co.* v. *Massachusetts, supra; Baltic Mining Co.* v. *Massachusetts, supra; Liverpool Ins. Co.* v. *Massachusetts, supra; American Ref. Co.* v. *Colorado,* 204 U. S. 103; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400.

The dissenting opinion is not supported by the authorities cited. *Southern Ry. Co.* v. *Greene, supra; Security Loan Assn.* v. *Albert,* 153 Ind. 198; *Cheney Bros. Co.* v.

Massachusetts, supra; Greene v. *Kentenia Corp.*, 175 Ky. 661; *Fire Assn.* v. *New York*, 119 U. S. 110.

Every reasonable presumption must be indulged in favor of the validity of a statute when it is attacked as unconstitutional and it must be sustained unless its invalidity is clearly demonstrated. *Sweet* v. *Rechel*, 159 U. S. 380; *Livingston County* v. *Darlington*, 101 U. S. 407; *Nicol* v. *Ames*, 173 U. S. 509; *Buttfield* v. *Stranahan*, 192 U. S. 492; *Powell* v. *Pennsylvania*, 127 U. S. 685.

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a writ of error under § 237 of the Judicial Code to the judgment of the Supreme Court of Illinois, affirming a decree of the Superior Court of Cook County dismissing the bill of the Hanover Fire Insurance Company, a corporation of New York, against Patrick J. Carr, County Treasurer and *ex-officio* tax collector of Cook County, Illinois. The prayer was for an injunction to prevent the distraint of the property of the complainant under a warrant for the collection of $10,678.50, as taxes due under a law of Illinois, which law, the bill averred, denied to the complainant the equal protection of the laws under the Fourteenth Amendment of the Federal Constitution.

The defendant filed an answer denying the claims of the bill and, after a reply, the case was heard by the trial court, which made findings of fact in its decree based on a stipulation by the parties, and entered a decree as set forth below.

The law in question reads as follows:

"Foreign Companies.—Tax on net receipts. Section 30. Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or munici-

pality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed: Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent. in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city." Cahill's Ill. Rev. Stat. 1925, c. 73, § 159, p. 1405.

This had been in force since 1869 and was part of the Act of March 11, of that year, entitled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois." The section was amended to the above form by an Act approved May 31, 1879.

By section 22 and other sections of the original Act of 1869 (Cahill's Ill. Rev. Stat. 1925, c. 73, § 150, p. 1402), it was made unlawful for a foreign insurance company to transact any insurance business in the State unless it had a prescribed amount of capital, appointed an attorney in the State on whom process of law could be served, filed a properly certified copy of the charter or deed of settlement of the insurance company, showing its name and the place where located, the amount of its capital and a detailed statement of its assets, together with its indebtedness, the losses adjusted and unpaid, the amount incurred and in process of adjustment, and a copy of its last annual report. It was required also to deposit with the Director

of Trade and Commerce of the State, for the benefit and security of the policy holders residing in the United States, a sum of not less than $200,000 in 6 per centum stock of the United States or the State of Illinois, or approved mortgage securities, with a provision that, so long as the company should continue solvent and comply with the laws of the State, it might collect the interest on these securities. The law provided that it should not be lawful for the agents of the company to transact business without procuring annually from the Director of Trade and Commerce the authority stating that such company had complied with all the requisitions of the act which applied to it; that any violation of the provisions of the act should subject the one violating it to a penalty not exceeding $500 for each violation; that such insurance companies should make annual statements of their condition and affairs to the Director of Trade and Commerce in the same manner and in the same form as similar insurance companies organized under the laws of the State, on or before the first day of March in each year for the year ending on the preceding 30th of September. The Insurance Superintendent was given authority by the same act to investigate affairs of the foreign companies, such investigation to be at the expense of the company, and, if he found the condition of any one unsound, to close up the business of the company by application to the circuit court of the county in which it had its principal office. By the same act, each foreign company was required to pay $30 for filing the charter, $10 for filing the annual statement required, and $2 for each certificate of authority for agents, and certain other fees of a similar character. Paragraphs 150, 152, 156, Cahill's Rev. Stat. Ill. 1925, c. 73.

By the Act of June 28, 1919 (Cahill's Ill. Rev. Stat. 1925, c. 73, § 79, p. 1390), it was provided that each nonresident corporation licensed and admitted to do an insur-

ance business in the State should pay an annual state tax for the privilege of so doing, equal to 2 per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the State after certain reductions; that the tax should be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality in the State, and that no municipality should impose any license fee, privilege or occupation tax upon such corporation for the privilege of doing an insurance business therein, but this should not be construed to prohibit the levy and collection of any state, county or municipal taxes upon the real and personal property of such corporations, or the levying and collection of taxes authorized by § 30, above quoted.

By § 12 of the same act (Cahill's Ill. Rev. Stat., c. 73, § 90, p. 1391), it was provided that, if any corporation should fail or neglect to make any report, or refuse to pay any tax assessment within thirty days after the same became due, the Department of Trade and Commerce should have power to revoke its license to transact the business of insurance in the State, or to suspend it until the reports were filed or the taxes paid.

The complainant insurance company complied with the requirements of § 22 and other unrepealed sections of the Act of 1869, and paid the 2 per cent. tax on its premiums received, as provided by the Act of 1919.

By the General Revenue Act of Illinois, in force since February 25, 1898 (Cahill's Rev. Stat. 1925, c. 120, § 329, p. 2042), personal property is to be valued at its fair cash value, which value is to be set down in one column to be headed "Full Value," and one-half part thereof is to be ascertained and set down in another column headed "Assessed Value." The one-half value of all the property so ascertained and set down is to be the value for all purposes of taxation. It is further stipulated in this case and found by the trial court, that for the

year 1923, and for many years prior thereto, there has been what is called an equalization, which systematically and intentionally reduces the amount set down in the column headed "Full Value" to not more than 60 per cent. of the actual market value of the personal property returned, and, by further reducing this by 50 per cent. to make the assessed value in accord with the statute, the tax is collected only on 30 per cent. of the full value.

This suit presents the question of the validity of the assessment made by taxing officers under § 30 for the year 1922. The Supreme Court of Illinois, in *People* v. *Barrett,* 309 Ill. 53, in an opinion announced June 20, 1923, near the close of the year for which the assessment of 1922 was made, held that the tax under § 30 was an occupation tax, and that no reduction should be permitted to foreign insurance companies in the assessment for taxation of their annual net receipts. The Superior Court found that the actual amount of net cash receipts of the complainant company was $90,824, less by $45,000 than the amount reported by the Board of Review, so that its decree forbade the collection of more than $7,184.18, instead of $10,678.50, for which the warrant had issued, but denied further relief. The complainant insisted that, under the previous practice and proper construction of § 30, as a property tax with due equalization and debasement, the tax assessed should have been $2,155.24, and that this, if anything, is all that should be collected from it. The Supreme Court, by a divided court, three judges dissenting, affirmed the decree of the Superior Court. *Hanover Fire Insurance Co.* v. *Carr,* 317 Ill. 366.

The petitioner is an insurance corporation, organized under the laws of the State of New York. By its charter, it is authorized to do a business of insurance against the hazard of fire, marine perils, inland navigation, tornado, theft, explosion, property damage to automobiles and

other property by collision, crop insurance, and other similar lines of insurance, against specified hazards. There are in Illinois domestic insurance companies, which do business in all of such risks. In *Fidelity & Casualty Company* v. *Board of Review*, 264 Ill. 11, decided in 1914, the Supreme Court held that the only insurance companies whose receipts come within § 30 are foreign fire, marine and inland navigation insurance companies, doing business in the State. And if they do business in the other hazards above stated, as the complainant and petitioner is authorized to do, then they must pay taxes on their net receipts made, not only from fire, marine and inland navigation company business, but also from the other hazards.

The situation, then, is that a foreign fire, marine and inland navigation insurance company, like the petitioner, must pay at a rate per centum equivalent to that imposed on personal property, a tax on the cash amount or 100 per cent. of its net receipts from all its insurance business. A domestic fire, marine and inland navigation insurance company pays no tax on its net receipts from any kind of insurance. Both pay on their personal property other than net receipts, as of a fixed date in each year, on an assessment of 30 per cent. of its full value.

The Supreme Court of Illinois for many years held the payment of a tax on the net receipts was a tax on personal property. *Walker* v. *Springfield*, 94 Ill. 364; *City of Chicago* v. *James*, 114 Ill. 479; *Chicago* v. *Phoenix Insurance Company*, 126 Ill. 276; *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378; *People* v. *Cosmopolitan Fire Insurance Company*, 246 Ill. 442. The net receipts were the gross receipts from each agency after the operating expenses had been deducted. The losses from fire and other risks assumed were not deducted. *National Fire Insurance Co.* v. *Hanberg*, 215 Ill. 378. It is quite apparent from reading these cases that, in prac-

tice, the net receipts were treated as personal property, and their assessment was by equalization and debasement reduced from full value, as all other personal property, until the decisions in *People* v. *Kent,* 300 Ill. 324 (1921) and in *People* v. *Barrett,* 309 Ill. 53.

The general principle upon which the Supreme Court of Illinois holds the tax complained of herein to be valid, is that the payment of it is part of the condition which the petitioner as a foreign insurance company is obliged to perform, in order to maintain and retain its right to do business in the State. It was settled in the *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410, and *Horn Silver Mining Company* v. *New York,* 143 U. S. 305, that foreign corporations can not do business in a State except by the consent of the State; that the State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is, that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated, in respect of the breach of the commerce clause of the Constitution, by the cases of *Sioux Remedy Company* v. *Cope,* 235 U. S. 197, 203, and *Looney* v. *Crane Company,* 245 U. S. 178, 188. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts, has been held void, *Terral* v. *Burke Construction Company,* 257 U. S. 529; in cases in which the State has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of

the corporation in the State but also on its property without the State, in violation of the due process clause of the Fourteenth Amendment, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *St. Louis Cotton Compress Company* v. *Arkansas,* 260 U. S. 346; and finally in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws, *Southern Railway Co.* v. *Greene,* 216 U. S. 400; *Air Way Corporation* v. *Day,* 266 U. S. 71. In the former of these last two cases, a railway corporation of another State had come into Alabama and secured a license to do business therein as an intrastate railway and, in course of that business, had acquired in the State property of a fixed and permanent nature, upon which it had paid all the taxes levied by the State. It was held that a new and additional franchise tax, for the privilege of doing business within the State, not imposed upon domestic corporations doing business in the State of the same character, violated the equal protection clause. In *Air Way Corporation* v. *Day,* a corporation of Delaware had much or all of its property in Ohio, where it was duly authorized to do business. Thereafter, a law of Ohio imposed five cents a share upon a certain proportion of non-par shares, authorized by the State of Delaware, which the court found to be arbitrary and not based on a classification of foreign corporations having any reasonable basis.

In the present case, there is no such permanent investment in the State of Illinois as there was in the *Greene* case in Alabama, but the averments of the bill show, that the complainant has from year to year secured renewal of its license in the State of Illinois, and has through many years past built up a large good will in the State of Illinois, and has associated with it a large number of agents in the various counties of the State, whose connection with it has resulted in a large and profitable business to

the complainant, and that it has large numbers of records containing information respecting its policy holders, the character and nature of their policies, and other records, the value of all of which would be destroyed if it were excluded from the State by a denial of the equal protection of the laws. In the *Greene* case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same, that pending the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens.

It is insisted that we must accept the construction of § 30 by the state Supreme Court, and, as the tax levied is sustained by its construction and has been held by the court to be an indispensable condition upon which the petitioner may continue to do business in Illinois, this Court is bound by both those conclusions.

It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this Court as to its meaning; but it is not true that this Court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis Southwestern Railway* v. *Arkansas*, 235 U. S. 350, at page 362, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:

"Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the

form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

This view has been upheld in many cases. *Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1, 27; *Ludwig* v. *Western Union Telegraph Company,* 216 U. S. 146; *Sioux Remedy Company* v. *Cope,* 235 U. S. 197; *St. Louis Cotton Compress Company* v. *Arkansas,* 260 U. S. 346. In the last case, the question was whether a foreign corporation doing business in Arkansas could be required by a law of the State to pay a so-called occupation tax, upon premiums paid by it to insurance companies not doing business in Arkansas, for insurance upon property of the corporation in Arkansas, the policies having been issued and accepted outside of Arkansas. This Court held the tax invalid, as a violation of the Fourteenth Amendment. In reaching this conclusion, this Court said (p. 348):

"The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this Court although bound by the construction that the Supreme Court may put upon the statute is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect."

In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a *quasi* citizen of the State and entitled to

equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind.

In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations, in engaging in business within the State. To leave the determination of such a question finally to a state court would be to deprive this Court of its independent judgment in determining whether a federal constitutional limitation has been infringed. While we may not question the meaning of the tax law, as interpreted by the state court, in the manner and effect in which it is to be enforced, we must re-examine the question passed upon by the state court, as to whether the law complained of is a part of the condition upon which admission to do business of the State is permitted and is merely a regulating license by the State to protect the State and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the State as they are made by other taxpayers of the State. Our power and duty in this regard must follow from our decisions, and while the exact question has not heretofore been considered, there can be no doubt that our conclusion finds its complete support in the analogies of other cases in which we have had to determine what our duty is in dealing with the alleged invalidity of state legislation. *Bailey* v. *Alabama*, 219 U. S. 219, 239; *Corn Products Co.* v. *Eddy*, 249 U. S. 427, 432; *Appleby* v. *New York*, 271 U. S. 364; *Truax* v. *Corrigan*, 257 U. S. 312, 324, 325. What, therefore, we have

to decide here is whether the application of § 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether, under the law of 1919, the authority granted by the Department of Trade and Commerce, for which the company paid 2 per cent. of gross premiums received the previous year by it, put it upon a level with domestic insurance companies doing business of the same character.

It is plain that compliance with § 30 is not a condition precedent to permission to do business in Illinois. The state Supreme Court concedes this, but its reasoning that payment of the tax under the section is a condition to its doing business in Illinois, which may vary at the will of the State without regard to taxes on similar domestic corporations, is shown by the following passages:

"The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the State. Such a condition, being precedent, could of course be met but once. However, the greatest financial benefit to such a company flows from the continuation of the privilege to do business. Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege, and such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed." (p. 373.)

"Section 22 of the act relating to fire, marine and inland navigation insurance, aside from specifying certain requirements imposed upon foreign insurance companies seeking to do business in this state and specifying what shall be necessary to secure the right of entry, further provides: 'Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transact-

ing the business of fire and inland navigation insurance in this state without procuring annually from the Insurance Superintendent a certificate of authority stating that such company has complied with all the requisitions of this act which apply to such companies and the name of the attorney appointed to act for the company.' The provision of section 30 requiring the return of net receipts of this tax, are a part of the 'requisitions of this act.' It is evident, therefore, from the language in section 22 quoted, that before the appellant may continue in business in this state, its agent shall procure annually from the Insurance Superintendent of the State or his successor in law, a certificate showing that it has complied with the requirements of section 30 with reference to this tax. Such certificate can not be lawfully issued without such showing. This act provides no other means of collecting such tax and no reference is made for its collection." (p. 374.)

The Court then refers to another Act which imposes a penalty for violation of § 30 by placing risks or policies of indemnity upon property in any other manner than through regularly authorized agents, and justifying a revocation of the license for a period of not less than ninety days, and that it shall not be reissued until it appears that there is complete compliance with the laws of the State governing such companies, and until it has been shown that all taxes and penalties and expenses due thereunder have been paid.

"It seems clear, therefore," says the Court (p. 375), "that this tax is levied as compensation for the privilege of continuing their business in the State.

"While the Act of 1919 . . . imposes an annual state tax equal to two per cent. on the gross amount of the premiums received by any foreign insurance company during the preceding year, . . . that fact does not show that the tax imposed on the business of fire insurance by section 30 is not likewise a tax for the privilege of doing

business. The Act of 1919 requires that the tax there levied be paid to the State. Section 30 requires that the tax be apportioned among the State and the different municipalities of the situs of the agency. A valid reason is seen for this distribution of the tax. The foreign fire insurance company takes its net proceeds largely from the vicinity of its agencies and it is but just that it return to the municipality in which its agency is located something in lieu of the taxes that would otherwise be realized from such net receipts as are taken away."

The view of the Court seems to be that the constitutional necessity for equal application of the laws of the State to foreign and domestic corporations properly engaged in business, is avoided if only the State provides that failure to comply with the laws during the period, or at the end of the period, for which the license runs, justifies a revocation of the license pending the period, or a refusal to grant a new license for the following year. We do not think the State may thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a *quasi* domestic citizen. Of course, at the end of the year for which the license has been granted, the State may in its discretion impose, as conditions precedent for a renewed license, past compliance with its valid laws; but that does not enable the State to make past compliance with § 30 a condition precedent to a renewal of the license, if, as we find, that section violates the Fourteenth Amendment; for, as already said, while a State may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights. We have said in *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, and in *Kansas City, etc., Railroad Company* v. *Stiles,* 242 U. S. 111, 118, that a State does not surrender or abridge its power to change and revise

its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and that a State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants them; but the decision in *Southern Railway Company* v. *Greene, supra,* shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business, is not unlimited, and that any attempt, in a renewal, to vary the terms of the original license, which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its federal constitutional rights, can not be effective. The State, in dealing with foreign corporations, may properly and without discrimination as between them and domestic companies, regulate the former by a provision that, for a failure by them to comply with any valid law governing the conduct of their business in the State, the license already granted may be revoked. That is a legitimate condition in the treatment of foreign companies which do not have property and home within the State. It is a police regulation. But the power thus to revoke a license for breach of a law can only be validly exercised if the law be a constitutional one. By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign, within the State; and tax laws made to apply after it has been so received into the State are to be considered laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment. This conclusion is not only in accord with our previous decisions, but is sustained by the reasoning in a satisfactory judgment of the Court of Errors and Appeals

of New Jersey. *Erie Railway Co.* v. *State,* 31 N. J. L. 531, 542, 543, 544.

We thus reach the question whether a tax imposed upon foreign fire, marine and inland navigation insurance companies on the net receipts of all their business, whether fire, marine, inland navigation or other risks, is a denial of the equal protection of the laws, when domestic insurance companies pay no taxes on such net receipts. Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of § 30, and in the practice under it. But an occupation tax imposed upon 100 per cent. of the net receipts of foreign insurance companies admitted to do business in Illinois, is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business, which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent. of the full value of that property. It is a denial of the equal protection of the laws. *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 352, 353; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400. Analogous cases are many. *Cummings* v. *National Bank,* 101 U. S. 153; *Greene* v. *Louisville R. R. Co.,* 244 U. S. 499, 516;

Sioux City Bridge v. *Dakota County,* 260 U. S. 441, 445; *Taylor* v. *L. & N. R. R.,* 88 Fed. 350; *L. & N. R. R.* v. *Bosworth,* 209 Fed. 380, 452; *Washington Water Power Co.* v. *Kootenai County,* 270 Fed. 369, 374.

One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits, is contractual, and that, by coming into the State and engaging in business on the conditions imposed, it waives all constitutional restrictions, and can not object to a condition or law regulating its obligations, even though, as a statute operating *in invitum,* it may be in conflict with constitutional limitations. This argument can not prevail in view of the decisions of this Court in well considered cases. *Insurance Co.* v. *Morse,* 20 Wall. 445; *Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1; *Terral* v. *Burke Construction Co.,* 257 U. S. 529; *Fidelity & Deposit Company* v. *Tafoya,* 270 U. S. 426; *Frost* v. *Railroad Commission,* 271 U. S. 583.

The judgment of the Supreme Court of Illinois must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

DEUTSCHE BANK FILIALE NURNBERG *v.* HUMPHREY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 224. Submitted October 12, 1926.—Decided November 23, 1926.

1. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. P. 519.
2. In an action brought here on a debt arising from a deposit made in Germany and payable there on demand, in marks, it is erroneous to translate the amount due into dollars at the rate of exchange

existing when demand was made, the mark having depreciated thereafter. P. 519.

7 F. (2d) 330, reversed.

CERTIORARI (269 U. S. 547) to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court in a suit brought by Humphrey against the Deutsche Bank, under the Trading with the Enemy Act, to collect a debt contracted and payable in Germany.

Mr. Amos J. Peaslee for the petitioner, submitted.

Messrs. William Grant, William P. Hubbard, and *John B. Zimdars* for the respondent, submitted.

Solicitor General Mitchell filed a brief on behalf of the Alien Property Custodian and the Treasurer of the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to reach and apply to a debt due from the Deutsche Bank Filiale to Humphrey money seized by the Alien Property Custodian and paid into the Treasury of the United States. Humphrey, an American citizen, deposited money, payable on demand, in a German Bank in Germany, and demanded it, as the Courts have found, on or about June 12, 1915. The money was not paid, and this suit was begun on July 9, 1921, under the Trading with the Enemy Act; October 6, 1917, c. 106; 40 St. 411. The debt was a debt of German marks. The Courts below held that it should be translated into dollars at the rate of exchange existing when the demand was made. 7 Fed. (2d) 330. The value of the mark fell after that date and a writ of certiorari was granted by this Court to determine whether the time fixed for the translation into dollars was correct. 269 U. S. 547.

In this case, unlike *Hicks* v. *Guinness,* 269 U. S. 71, at the date of the demand the German Bank owed no duty

to the plaintiff under our law. It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. It has incurred no additional or other one since. A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. *Davis* v. *Mills,* 194 U. S. 451. See *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542. We may assume that when the Bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law—but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See *Société des Hôtels le Touquet Paris-Plage* v. *Cummings,* (1922) 1 K. B. 451. An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. *Legal Tender Cases,* 12 Wall. 457, 548, 549. Obviously, in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off.

There has been so little discussion of what we regard as the principles that ought to govern this question that

we refrain from citing the many cases that have touched upon it and content ourselves with stating what seems to us the proper rule, only adding a few words as to *Sutherland* v. *Mayer*, 271 U. S. 272. That case concerned the settlement of accounts of a German partnership having one member in America, and dealt with his claim to funds in America in the hands of the Boston branch until seized by the United States. With regard to the Boston partner's lien upon that fund the partnership contract fairly might be regarded as subjecting the German partners to American law and warranting a settlement as of the date when it first became legal after the war, taking the mark at its value at that time. *Hicks* v. *Guinness*, 269 U. S. 71. It was held that in an equitable proceeding where it was hard to lay down any logical rule substantial fairness warranted that result, referring to cases that arose after the Civil War. Here we are lending our Courts to enforce an obligation (as we should put it, to pay damages;) arising from German law alone and ought to enforce no greater obligation than exists by that law at the moment when the suit is brought.

Decree reversed.

MR. JUSTICE SUTHERLAND, dissenting.

It is well settled, I think, that, where the cause of action for a tort or breach of contract to deliver goods accrues in a foreign country and is sued on here, the time for fixing the value of foreign money in dollars is the date when the wrong was committed or the breach occurred. This Court has recently applied the same rule to the case of a simple debt *payable in this country*, *Hicks* v. *Guinness*, 269 U. S. 71, and to the settlement of partnership accounts, where the partnership funds were partly here and partly abroad, *Sutherland* v. *Mayer*, 271 U. S. 272. The majority opinion rests upon the distinction that

the debt upon which recovery here is sought was *payable in Germany.* The distinction, I think, is fallacious, and proceeds from a very narrow view of the principles applied in *Hicks* v. *Guinness* and *Sutherland* v. *Mayer.*

It is said that when the bank failed to pay on demand, its liability was fixed by German law at a certain number of German marks, and in marks only; that it continued to be a liability in marks only and was open to satisfaction by the payment of that number of marks at any time, however much the mark might have fallen in value as compared with other things; citing *Société des Hôtels le Touquet Paris-Plage* v. *Cummings,* [1922] 1 K. B. 451. And that, of course, is true if the payment be made *in Germany,* where marks remain legal tender at all times irrespective of their fluctuating value when measured by their purchasing power or by the money of other countries. And this is all that is held in *Société des Hôtels, etc.* v. *Cummings, supra.* See pp. 458, 461, 464. It, likewise, may be assumed that if suit had been brought in Germany, a judgment at any time for the number of marks called for by the obligation would have satisfied the requirements of German law, since there marks were not only the things to be delivered but the lawful money with which to satisfy a breach of an obligation to deliver them. But if suit be brought in a court of this country, where marks are not money but things only, the judgment must be in dollars and cannot be in marks any more than it could be in wheat if the broken contract related to that commodity.

The view that the judgment date should govern puts undue emphasis upon the character of the thing to be delivered and ignores completely the all-important element of the time when the delivery should have been made. In respect of that element, I see no good reason for making a distinction between marks and wheat. In either case, if suit be brought in Germany, the injured

party is entitled to recover the amount of his loss in marks and in marks only. In the one case, the subject matter (wheat) must be translated into money; but not so in the other, for the subject matter is money already. In the case of wheat, therefore, the date of the breach must be considered because, presumably in Germany as here, it is the value of the wheat in marks at that time which fixes the amount of recovery. In the case of marks, however, the element of time is of no consequence since, in Germany, the value of a mark can be measured only by itself.

But in an action brought here to recover upon a failure to deliver marks in Germany, the question of time becomes material; for here a mark is not money, but a commodity; and if plaintiff is to be compensated in dollars for his *loss*, we must inquire, When did the loss occur? just as we must make that inquiry in order to fix in dollars the value of wheat in a suit to recover for the non-delivery of that commodity. To me it seems clear that, in the one case as in the other, the basis of recovery must be the value in dollars of the thing lost at the time of the loss. In this respect, a simple debt payable in marks and an obligation to deliver goods in Germany stand upon the same footing. In either case, the injured party is entitled to have in the money of this country the value of what he would have obtained if the contract had been performed at the stipulated time. Lord Eldon, in *Cash* v. *Kennion*, 11 Ves. 314, 316, expressed the applicable principle when he said: "I cannot bring myself to doubt, that, where a man agrees to pay £100 in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed."

The date for conversion adopted by this Court after the Civil War in respect of obligations payable in

Confederate currency was the date, and not the maturity, of the obligation, upon the ground that such currency never had been lawful; but in a *dictum* by Mr. Justice Field in *Effinger* v. *Kenney,* 115 U. S. 566, 575, it is clearly recognized that, if the foreign currency involved be lawful, the date for conversion is that of the maturity of the contract. In that case, "The damages recoverable for a breach of the contract are to be measured by the value of the currency at its maturity."

To take the date of judgment for determining the value is to adopt for the measurement of a loss a test resting upon the fluctuating chances of a court calendar instead of upon an event already fixed,—that is, to put aside certainty for uncertainty. The date of the breach, whether of a contract to deliver goods or to pay money, marks the essential event which gives rise to the cause of action and bears a necessary relation to the wrong sought to be redressed; while the date of the rendition of judgment bears no relation whatever to the wrong complained of and has nothing to do with the cause of action. The cases are not agreed; but an examination of them convinces me that the conclusion I have indicated by the foregoing is supported by the great weight of authority. See for example, *Page* v. *Levenson,* 281 Fed. 555, 558; *Dante* v. *Miniggio,* 298 Fed. 845; *Wichita Mill & E. Co.* v. *Naamlooze, etc., Industrie,* 3 F. (2d) 931; *Hoppe* v. *Russo-Asiatic Bank,* 235 N. Y. 37, 39, affirming 200 App. Div. 460, 465; *Simonoff* v. *Granite City Nat. Bank,* 279 Ill. 248, 254; *Grunwald* v. *Freese,* (Cal.) 34 Pac. 73, 76; *Manners* v. *Pearson & Son,* [1898] 1 Ch. 581, 587–588, 592–593; *Société des Hôtels* v. *Cummings,* [1921] 3 K. B. 459, 461 (reversed on another point, [1922] 1 K. B. 451, 455, 463, 465), *Uliendahl* v. *Pankhurst Wright & Co.,* 39 Times L. R. 628; *Peyrae* v. *Wilkinson,* [1924] 2 K. B. 166; *Barry* v. *Van den Hurk,* [1920] 2 K. B. 709, 712; *In*

re British American Continental Bank, [1922] 2 Ch. 589, 594–598.

The case last cited was a winding-up proceeding, and the question arose over the conversion into English money of the amount of a debt payable in Belgium in Belgian currency. The court adopted as the date for conversion into English money the date when the debt was payable in Belgium, saying (p. 595): " . . . this mode of computation and thus converting the one currency into the other is based upon damages for the breach of contract to deliver the commodity bargained for (i. e., the foreign currency) at the appointed time and place; consequently the date for conversion is the date of breach and not the date of the judgment." After reviewing the prior cases, including both decisions in *Société des Hôtels* v. *Cummings, supra,* the court concluded that " the principle in no way depends either upon the nationality of the creditor or upon the fact that the place of payment is in the creditor's own country as distinguished from some other country, but applies, if at all, to every case where an action is brought in England for the recovery of a debt payable in some other currency than English money."

The same principle is announced in *Lebeaupin* v. *Crispin,* [1920] 2 K. B. 714, 723, in an action for breach of contract to deliver salmon. The court said: "If the damages are fixed at the date of breach where the contract is wholly to be performed in England, such also, I think, should be the result where the breach is out of England. There should not be varying rules in such a case. If the damages are once crystallized at the date of breach, then a definite date is given for the ascertainment of exchange, and the amount found payable at the hearing is awarded without regard to the fluctuations of the possible date of trial."

I think it is extremely desirable that the rule established should be one capable of uniform application. To take the date of the judgment is to establish a rule which does not meet this requirement. The amount of the recovery will depend upon whether suit is promptly brought or promptly prosecuted; whether the defendant interposes dilatory measures; whether the call of the docket is largely in arrears or is up-to-date; and, perhaps, upon whether there is a successful appeal and a new trial with the consequent annulment of the old judgment and the rendition of a new one. Under these circumstances it may well happen that, in one case, where judgment is not delayed, the plaintiff will recover a substantial sum, while in a precisely similar case, where judgment is delayed until the foreign currency has greatly depreciated, the sum recovered by comparison may be altogether insignificant. See *Page* v. *Levenson, supra,* pp. 558–559; *Lebeaupin* v. *Crispin, supra,* p. 722–723.

I am of opinion, therefore, that the judgment below should be affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and MR. JUSTICE SANFORD concur in this opinion.

MASSACHUSETTS STATE GRANGE *v* BENTON, ATTORNEY GENERAL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 296. Argued October 13, 1926.—Decided November 23, 1926.

1. *Semble* that there is no inconsistency between the Daylight Saving Acts of Massachusetts and the Act of Congress of March 19, 1918, § 2, which fixes standard time with relation to the acts of federal officers and departments and the accrual and determination of rights and performance of acts by persons subject to the jurisdiction of the United States. P. 527.

2. No injunction should issue from a federal court to restrain state officers from enforcing a state law, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury. P. 527.
3. A court of the United States should not intervene between a State and a town of the State's creation to determine how far the town should share in the State's benevolence. P. 528.
4. Distinction explained between want of "jurisdiction" in equity—e. g., want of a fitting case for an injunction—and want of jurisdiction, i. e., power, in the court. P. 528.

10 F. (2d) 515, affirmed.

APPEAL from a decision of the District Court dismissing a bill brought by The Massachusetts State Grange, The Inhabitants of the Town of Hadley, the Brotherhood of Locomotive Engineers, and others, to enjoin Jay R. Benton, Attorney General of Massachusetts, Frederick W. Cook, Secretary, Payson Smith, Commissioner of Education, et al., from performing official acts in execution of the Daylight Savings Acts of that State.

Mr. Frank W. Morrison for appellants.

Messrs. Jay R. Benton, Attorney General of Massachusetts, and *Lewis Goldberg* were on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill brought by different parties having different and unconnected interests seeking a declaration that the Daylight Saving Acts of Massachusetts, Acts of 1920, c. 280, Acts of 1921, c. 145, are inconsistent with the Act of Congress of March 19, 1918, c. 24; 40 St. 450; (see Act of August 20, 1919, c. 51; 41 St. 280,) and unconstitutional, and asking an injunction to prevent the several defendants from doing their respective official parts to carry out the Massachusetts law. It was heard by three

judges in the District Court, and upon motion it was dismissed. 10 F. (2d) 515.

The Act of Congress, § 2, fixes the standard time and provides that "In all statutes, orders, rules, and regulations relating to the time of performance of any act by any officer or department of the United States, whether in the legislative, executive, or judicial branches of the Government, or relating to the time within which any rights shall accrue or determine, or within which any act shall or shall not be performed by any person subject to the jurisdiction of the United States, it shall be understood and intended that the time shall be the United States standard time of the zone within which the act is to be performed." The Massachusetts statute advances the standard time thus fixed by one hour; and provides that the time shall be the United States standard eastern time so advanced, in all laws, regulations, &c., relating to the time of performance of any act by any officer or department of the Commonwealth or of any county, city, &c., thereof, or relating to the time in which any rights shall accrue or determine, or within which any act shall or shall not be performed by any person subject to the jurisdiction of the Commonwealth, and in all the public schools and institutions of the Commonwealth, &c., and in all contracts or choses in action made or to be performed in the Commonwealth.

The Court below found no inconsistency between the two Acts and we have seen no sufficient reason for differing from it upon that point. But it also went on the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury. *Cavanaugh* v. *Looney,* 248 U. S. 453, 456. *Hygrade Products Co.* v. *Sherman,* 266 U. S. 497, 500. *Fenner* v. *Boykin,* 271

U. S. 240. No such necessity is shown here. The corporations other than the Town of Hadley do not even allege any direct interest. The Town of Hadley makes a case that concerns none of the other plaintiffs, and complains only that by failure to comply with the Massachusetts statute it will be held to have lost its claim to certain State aid for its schools. It is said that in fact Hadley has received its share and has no further interest in the case, but in any event it is plain that a Court of the United States would not intervene between a State and a town of the State's creation to determine how far the town should share in the State's benevolence. Of the individual plaintiffs, Mann alleges that the statute makes it more costly for him to employ labor at the first hours of the day, that he owns land on both sides of the New Hampshire line and has to travel to and fro between them, that New Hampshire and the railroad keep to the standard eastern time, and that to adjust himself to the two standards causes him worry and pecuniary loss. The plaintiff Snow alleges that her children have to get up an hour earlier to go to school and so lose an hour's sleep, and that women who have husbands employed by the railroads as well as children have to keep two standards of time in their heads, and other matters that do not concern her. The plaintiff Clarke alleges nothing that needs mention. Evidently this is not a case for an exception to the general rule.

Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked. In a strict sense the Court in this case had jurisdiction. It had power to grant an injunction, and if it had granted one its decree, although wrong, would not have been void. But upon the merits we think it too plain to need argument that to grant an injunction upon the allegations of this bill would be to fly in

the face of the rule which, as we have said, we think should be very strictly observed.

Decree affirmed.

The separate opinion of MR. JUSTICE MCREYNOLDS.

Unless much said in *Ex parte Young*, 209 U. S. 123, is trivial or nonsense, this is a suit against Massachusetts and beyond the possible jurisdiction of federal courts, as expressly declared by the Eleventh Amendment. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." Accordingly, the trial court had no jurisdiction and should have dismissed the proceeding for that reason.

It is well to remember that the Massachusetts Daylight Saving Act is not a criminal statute, that no penalty is prescribed for non-observance, that no defendant was charged with the duty of enforcement, that no proceeding against any complainant could be instituted thereunder and none was in contemplation.

The bill discloses a bald purpose to secure an adjudication in respect of the constitutionality of a state statute. In no just sense did it seek protection of any property right threatened with unlawful invasion by an officer claiming to proceed under a void enactment. *Fitts* v. *McGhee*, 172 U. S. 516, as construed in *Ex parte Young, supra*, pp. 156, 157, ought to be followed and treated as controlling. "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an Act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the Act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party."

DODGE *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 341. Argued October 27, 1926.—Decided November 23, 1926.

1. Proceedings to forfeit a motor boat, under § 26 of Title II of the National Prohibition Act, may be maintained even if the seizure of the boat was by a person not authorized, since subsequent adoption of the seizure, by the Government, is retroactive. P. 531.
2. The jurisdiction of the court in such a case was secured by the fact that the *res* was in the power of the prohibition director when the libel was filed. P. 532.

11 F. (2d) 522, affirmed.

CERTIORARI (271 U. S. 655) to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court (7 F. (2d) 189) dismissing a libel brought by the United States to forfeit a motor boat, under § 26 of the National Prohibition Act.

Mr. Daniel T. Hagan, with whom *Mr. Peter W. McKiernan* was on the brief, for the petitioners.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. John J. Byrne,* Attorney in the Department of Justice, were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This was a proceeding in the District Court of the United States for the condemnation of the motor boat "Ray of Block Island." The owners appeared as claimants and moved that the libel be dismissed on the ground that the facts alleged did not warrant a condemnation. The District Court granted the motion. 7 F. (2d) 189.

The Circuit Court of Appeals reversed the decree. 11 F. (2d) 522. As there was a conflict of decisions between different Circuit Courts of Appeal a writ of certiorari was granted by this Court. 271 U. S. 655.

The libel was brought under the National Prohibition Act; October 28, 1919, c. 85, Title II, § 26, 41 St. 305, 315. It alleged that police officers of the City of Providence, Rhode Island, discovered a man named, seemingly one of the claimants, in the act of transporting contrary to said law intoxicating liquors in the "Ray of Block Island," over navigable waters of the United States; that the officers seized the liquors and the boat, and arrested the man; that he subsequently was arrested by officers of the United States, was convicted of transporting intoxicating liquors in violation of said law and was fined; that the motor boat was now in custody of a federal prohibition director for the District of Rhode Island; and that by reason of the premises the motor boat was subject to condemnation and sale. The ground on which the libel was dismissed by the District Court was that the language of § 26, making it the duty of "the Commissioner, his assistants, inspectors, or any officer of the law" to seize the liquor and vehicle, did not extend to the police officers of the City, who had no authority from the State to take these steps. It is stated in argument and perhaps fairly might be assumed, if we thought it important, that when the vessel was handed over to the prohibition director the liquor was no longer aboard and that the man arrested was not present at the scene. See *United States* v. *One Red Motor Truck*, 6 F. (2d) 412. The Circuit Court of Appeals while agreeing with the above construction of § 26 held that the Government might adopt the seizure and give it retroactive effect. This is in accord with *United States* v. *Story*, 294 Fed. Rep. 517, (Fifth Circuit) but contrary to *United States* v. *Loomis*, 297 Fed. Rep. 359 (Ninth Circuit); this last decision being considerably

qualified, however, by the same Court in the later case of *United States* v. *One Studebaker Seven-Passenger Sedan,* 4 F. (2d) 534.

The Circuit Court of Appeals relied on the often quoted language of Mr. Justice Story in *The Caledonian,* 4 Wheat. 100, to the effect that anyone may seize any property for a forfeiture to the Government, and that if the Government adopts the act and proceeds to enforce the forfeiture by legal process, this is of no less validity than when the seizure is by authority originally given. The statement is repeated by the same judge in *Wood* v. *United States,* 16 Pet. 342, 359, and *Taylor* v. *United States,* 3 How. 197. See also *Gelston* v. *Hoyt,* 3 Wheat. 246, 310. The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. However effected, it brings the object within the power of the Court, which is an end that the law seeks to attain, and justice to the owner is as safe in the one case as in the other. The jurisdiction of the Court was secured by the fact that the *res* was in the possession of the prohibition director when the libel was filed. *The Richmond,* 9 Cr. 102. *The Merino,* 9 Wheat. 391, 403. *The Underwriter,* 13 F. (2d) 433, 434. We can see no reason for doubting the soundness of these principles when the forfeiture is dependent upon subsequent events any more than when it occurs at the time of the seizure, although it was argued that there was a difference. They seem to us to embody good sense. The exclusion of evidence obtained by an unlawful search and seizure stand on a different ground. If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used. The decree of the Circuit Court of Appeals is affirmed.

Decree affirmed.

LUCKENBACH STEAMSHIP COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 32. Argued March 11, 12, 1926.—Decided November 23, 1926.

1. An appeal from a judgment of the Court of Claims (entered April 28, 1924,) applied for while a motion for a new trial and amended findings was pending, though premature, was not a nullity, and became effective when the motion was denied and the appeal allowed. P. 534.
2. Time did not run against the right to appeal while the motion for new trial and amended findings was pending. P. 535.
3. The limits placed by Congress on the scope of review in this Court of judgments of the Court of Claims, do not deprive defeated claimants of due process of law under the Fifth Amendment. P. 536.
4. Under the law and rules governing the subject, review of judgments of the Court of Claims is confined to questions of law shown by the record when made up as the rules direct. Evidence is not included in the record, nor rulings on the admission or rejection of evidence. P. 537.
5. Where the findings are ambiguous, contradictory or silent in respect of a material matter, or appear on their face ill-founded in point of law, the case may and should be remanded for corrected or additional findings, but this is to be done only where the need for correction or addition is apparent either on the face of the findings or when they are examined in connection with the pleadings. P. 539.
6. An order of the Court of Claims overruling a motion for a new trial, which brought nothing new into the case, *held* not reviewable. P. 540.
7. Evidential and plainly subordinate matter is inappropriate to a finding of ultimate facts. P. 540.
8. A finding of the value of property taken by the Government *held* a finding of fact, and not reviewable. P. 540.
9. A claimant is not in position to press requests for findings which do not appear to have been tendered to the Court of Claims as required by the Rule. P. 541.

10. Where an owner of boats which were taken over by the United States under the Act of June 15, 1917, elected not to accept as full compensation the sum fixed by the President, but to accept three-fourths of it, under the Act, and sue for more, but recovered only the additional fourth which he had declined to accept, he was not entitled under the Fifth Amendment to interest on such deferred compensation. P. 541.

59 Ct. Cls. 628, affirmed.

Appeal from a judgment of the Court of Claims rejecting a claim for a balance alleged to be due appellant on several barges and tugs, which were taken over by the Government under the Act of June 15, 1917.

Messrs. C. C. Daniels and *Peter S. Carter* for the appellant.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* and *Mr. Joseph Henry Cohen,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a suit to recover a balance alleged to be due for several barges and tugs, the possession of and title to which were taken over by the United States under the Act of June 15, 1917, c. 29, 40 Stat. 182. The compensation fixed at the time by the President not being satisfactory to the claimant, three-fourths of it was paid, and the claimant, conformably to the Act, sued to recover a further sum which, with what was paid, was alleged to be just compensation. The Court of Claims found that the amount fixed by the President was just and entered judgment for the claimant for the one-fourth remaining unpaid. 59 Ct. Cl. 628. The claimant being still dissatisfied brought the case here.

The judgment was entered April 28, 1924. The claimant seasonably moved for a new trial and included in

the motion a request for amended findings. While that motion was pending the claimant, becoming apprehensive lest the time allowed for an appeal might be running, filed with the clerk an application for an appeal from the judgment. Thereafter the motion for a new trial, with the request for amended findings, was denied, and the application for an appeal was then brought to the Court's attention and allowed. A little later the claimant applied for an appeal from the order refusing a new trial and amended findings and the court allowed that appeal.

Counsel for the United States insist that neither appeal was effective. Plainly the second was not, for it was from an order which was not appealable. But the first was from the judgment and we think it was well taken. The only infirmity suggested is that the application was premature in that it was made before the motion for a new trial and amended findings was disposed of. It is true that with that motion pending the judgment was not so far final as to cause time to run against the right to appeal, *United States* v. *Ellicott*, 223 U. S. 524, 539; but while the application was thus premature it was not a nullity. Evidently it was intended to be pressed only if and when the motion for a new trial and amended findings was denied. The court so regarded it, and therefore gave effect to it after disposing of the pending motion. That this was right is shown in *Ex parte Roberts*, 15 Wall. 384, 385.

After the record was filed in this Court the claimant moved that the case be remanded to the Court of Claims with directions either to find or refuse to find each of the several matters specified in the request for amended findings, or, in the alternative, to include in the record the motion for a new trial and that request, together with the evidence on which they were based. Consideration of the motion to remand was postponed to the hearing on the merits, and that hearing has been had.

The presentation of the case on behalf of the claimant has proceeded on the assumption that our power to review is as broad as the power of the Court of Claims to hear and determine in the first instance, and that such a review if not otherwise provided for is vouchsafed by the due process of law clause of the Fifth Amendment. But the assumption is a mistaken one. The Court of Claims is a special tribunal established to hear and determine suits against the United States on claims of specified classes. Except as Congress has consented, there is no right to bring these suits against the United States, and therefore the right arising from the consent is subject to such restrictions as Congress has imposed. *McElrath* v. *United States,* 102 U. S. 426, 440. One of these is that the trial shall be by the court without a jury. Another, in force until changed by the Act of February 13, 1925, c. 229, 43 Stat. 936, forbade an appellate review where the decision was against the claimant and the amount in controversy was not in excess of three thousand dollars. Others, still in force, limit the scope of the review where one is permitted. And, apart from the nature of these suits, the well settled rule applies that an appellate review is not essential to due process of law, but is a matter of grace. *McKane* v. *Durston,* 153 U. S. 684, 687; *Andrews* v. *Swartz,* 156 U. S. 272, 275; *Kohl* v. *Lehlback,* 160 U. S. 293, 297, 299; *Reetz* v. *Michigan,* 188 U. S. 505, 508; *The Francis Wright,* 105 U. S. 381, 386; *Montana Company* v. *St. Louis Mining and Milling Company,* 152 U. S. 160, 171.

The Constitution, Art. III, sec. 2, declares the appellate jurisdiction of this Court shall be subject to "such exceptions" and be exercised under "such regulations" as Congress may prescribe. This provision was much considered in *The Francis Wright, supra,* and the views there expressed are particularly apposite here. The Court said (p. 386):

"Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for a trial of all parts of a case. Everything beyond that is a matter of legislative discretion, not of constitutional right."

Save in special cases not needing present mention, Congress never has provided for a general review by this Court of cases coming from the Court of Claims. On the contrary—and probably because that court is composed of five judges, all usually hearing cases together and the concurrence of three being necessary to a decision in any case—Congress has pursued the policy of permitting only a limited review on questions of law; and the procedural rules applicable to such cases which this Court has promulgated under congressional authorization always have recognized that policy. The rules in force when this case was before the Court of Claims are copied in the margin.[1] Others promulgated since

[1] RULE I.

In all cases hereafter decided in the Court of Claims, in which. by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

(1) A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

and equally recognizing the same policy, are also copied there.[2]

This Court uniformly has regarded the legislation and rules as confining the review to questions of law shown by the record when made up as the rules direct. Bills of exception are not recognized in either the legislation or the rules; nor is there other provision for bringing the evidence into the record or including therein the various rulings involved in applying to the evidence presented the rules which mark the line between what properly may be considered and what must be rejected. As long ago as *Mahan* v. *United States*, 14 Wall. 109, 111, this Court said of the rules that they could not be examined "with-

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(2) A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

RULE III.

In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

RULE IV.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

RULE V.

In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.

[2] The following rules partly modifying those just set forth were promulgated June 8, 1925, 266 U. S. 683

out seeing that the purpose was to bring nothing here for review but questions of law, leaving the Court of Claims to exercise the functions of a jury in finding facts, equivalent to a special verdict and with like effect." Other cases establish that where the findings are ambiguous, contradictory or silent in respect of a material matter, or appear on their face ill-founded in point of law, the case may and should be remanded for corrected or additional findings, but that the mere assertion on the part of a complaining party that they are against the evidence or not supported by it, or give too much or too little weight to particular evidence, affords no ground for so remanding the case, because that is to be done only where the need for correction or addition is apparent either on the face of the findings or when they are examined in connection with the pleadings. *United States* v. *Adams*, 6 Wall. 101, 110–112; *Moore* v. *United States*, 91 U. S.

RULE 38.

JUDGMENTS OF THE COURT OF CLAIMS—PETITIONS FOR REVIEW ON CERTIORARI.

(See sec. 3(b) of the Act of February 13, 1925.)

1. In any case in the Court of Claims where both parties request in writing, at the time the case is submitted, that the facts be specially found, it shall be the duty of that court to make and enter special findings of fact as part of its judgment.

2. In any case in that court where special findings of fact are not so requested at the time the case is submitted, a party aggrieved by the judgment may, not later than twenty days after its rendition, request the court in writing to find the facts specially; and thereupon it shall be the duty of the court to make special findings of fact in the case and, by an appropriate order, to make them a part of its judgment. The judgment shall be regarded as remaining under the court's control for this purpose.

3. The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidence from which they are found.

270; *United States* v. *Smith,* 94 U. S. 214, 218–219; *United States* v. *Clark,* 96 U. S. 37, 38–39; *McClure* v. *United States,* 116 U. S. 145; *Union Pacific Ry. Co.* v. *United States,* 116 U. S. 154; same case, 116 U. S. 402; *District of Columbia* v. *Barnes,* 197 U. S. 146, 150; *Brothers* v. *United States,* 250 U. S. 88, 93.

In this case the findings are direct, free from ambiguity, consistent, fully responsive to the issues, and contain nothing indicating that they or any of them are ill-founded in point of law; and the unavoidable conclusion from them is that the judgment is for the right sum, unless there be merit in a contention respecting interest to be noticed later on. So, whether taken by themselves or in connection with the pleadings, they are not open to criticism, unless possibly as to the matter of interest.

A copy of the motion for a new trial and request for amended findings is exhibited with the motion to remand. The motion for a new trial brought nothing new into the case, and the order overruling it is not open to review. The request for amended findings asked that two of the findings be changed—one by including therein matters which at most are plainly evidential and subordinate, and therefore not to be included in a finding of ultimate facts; and the other by increasing the amount found to be just compensation for the vessels at the time they were taken over from $1,500,000 to $4,777,000—more than three times what the court found it to be. Whether one amount or the other was the true one was a question of fact. The court refused to change the finding and thereby affirmed that the fact was as stated therein. This Court cannot re-examine the question, and the fact that the claimant is still dissatisfied constitutes no ground for remanding the question to the Court of Claims for re-examination by it. As part of its request for amended findings the claimant tendered twenty-seven additional findings and asked that they be adopted. All were rejected. There is no showing

that they had been tendered theretofore in conformity to the fifth rule, before quoted; and if that was not done the claimant was not in a position to press them. *United States* v. *Driscoll,* 131 U. S. Appendix clix. As to many, if not all, there are also other reasons why the court was free to reject them. Many state matters which, even if true, are evidential only; some are merely argumentative, and others contain statements having no relation to the issues under the pleadings. It must be held therefore that neither the motion for a new trial nor the request for amended findings gives any support to the motion to remand. Independently of them it lays no foundation for granting what it asks.

The remaining question is whether there should have been an allowance of interest. The vessels were not taken over at the outset, nor until after the compensation had been fixed by the President at $1,500,000, and the officer who was to take them over had been instructed to pay that sum to the claimant on receiving the vessels with proof of ownership and bill of sale. The claimant was advised of this, and possession of the vessels was passed to the officer a few days later. But it developed that the claimant, although theretofore in possession and operating the vessels, was the real owner of only two of them. The claimant then procured bills of sale to it from the owners of the other vessels and executed a bill of sale to the United States for all. This was about two weeks after possession was passed to the officer. The officer was prepared and willing to pay the full $1,500,000 when the bill of sale was delivered to him, but the claimant was not willing to accept it as full compensation. Afterwards the claimant elected to accept three-fourths of it, and to reserve a right to sue for enough more to make full compensation. The three-fourths was then paid. This was about six weeks after the delivery of the bill of sale. The judgment awards the remaining one-fourth as a sufficient

sum, with that already paid, to make just compensation for the vessels at the time they were taken over. In short, while the United States was prepared, willing and offering when the vessels were taken over to pay the sum now adjudged to have been just compensation at that time, the claimant was not then in a position entitling it to demand or receive compensation because as yet it was without a good title and had not executed a bill of sale to the United States; and after it became entitled to compensation it rejected the offer, which was still outstanding, to pay that sum in full payment and elected to accept three-fourths as a partial payment and to take chances on enlarging the compensation by resorting to this suit against the United States. The effort to obtain an enlargement has resulted, as already shown, in establishing that the amount offered and rejected was all that justly could have been demanded. In these circumstances we think such postponement as has occurred in the actual payment of the compensation is attributable entirely to the claimant, and therefore that an allowance of interest to the time of payment is not in this case made essential by the constitutional provision expounded and applied in *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306, and *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123.

Judgment affirmed.

SALINGER *v.* UNITED STATES.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

No. 238. Argued October 21, 1926.—Decided November 23, 1926.

1. The statutes which define and distribute federal appellate jurisdiction and make the existence of a constitutional question the test of the right to a review, as also of the court in which the review may be had, always have been construed as referring to a

question having sufficient substance to deserve serious consideration, and not one which is so devoid of merit as to be fanciful or frivolous, or which is not open to discussion because settled by prior decisions. P. 544.

2. An indictment charging the offense of causing a letter to be delivered by mail in a designated district in furtherance of a fraudulent scheme, is triable in that district, though it shows that the letter was mailed elsewhere. *Salinger* v. *Loisel,* 265 U. S. 224. P. 546.
3. The purpose of the guaranty of the right of confrontation in the 6th Amendment is to continue and preserve that right as it already existed, with its recognized exceptions, at common law. P. 548.
4. Admission in a criminal case of evidence, otherwise hearsay, but admissible at common law because of its relation to the defendant through his own acts and conduct, is not a departure from this guaranty. P. 547.
5. Withdrawal by the Court from the jury of parts of an indictment unsupported by evidence is not an amendment of the indictment, and is not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." P. 548.
6. Where a writ of error which should have been taken from the Circuit Court of Appeals was allowed from this Court before the Jurisdictional Act of February 13, 1925, the case must be transferred to that court under the Act of September 14, 1922, which, although repealed by the Act of 1925, is to be applied, under the terms of the saving clause, to proceedings for the review of judgments rendered theretofore. P. 549.

Cause Transferred.

Error to a conviction in the District Court for a violation of § 215 of the Criminal Code which makes it a criminal offense to use the mail for the purpose of executing a scheme to defraud.

Messrs. B. I. Salinger and *Arthur F. Mullen,* with whom *Mr. Robert Healy* was on the brief, for the plaintiff in error.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr.*

Randolph S. Collins, Attorney in the Department of Justice, were on the brief, for the United States.

Mr. Justice Van Devanter delivered the opinion of the Court.

By this direct writ of error we are asked to review a judgment of conviction in the federal district court for South Dakota for a violation of § 215 of the Criminal Code which makes it a criminal offense to use the mail for the purpose of executing a scheme to defraud. The writ was sued out on the assumption that the case is one involving the construction and application of certain provisions of the Constitution relating to accusations and prosecutions for criminal offenses. If the assumption was right the writ was properly allowed under § 238 of the Judicial Code as existing at that time (November 29, 1924); otherwise the review should have been sought in the Circuit Court of Appeals.

The statutes which define and distribute federal appellate jurisdiction and make the existence of a constitutional question the test of the right to a review, as also of the court in which the review may be had, always have been construed as referring to a question having sufficient substance to deserve serious consideration, and not one which is so devoid of merit as to be fanciful or frivolous, or which is not open to discussion because settled by prior decisions. *Goodrich* v. *Ferris,* 214 U. S. 71, 79, 81; *Brolan* v. *United States,* 236 U. S. 216; *Sugarman* v. *United States,* 249 U. S. 182. Under a different construction the restrictions and distributing provisions in the statutes would have little purpose; for constitutional questions of no substance readily could be devised and presented as mere pretexts for obtaining a review on other questions. *United Surety Co.* v. *American Fruit Co.,* 238 U. S. 140, 142.

This case, being criminal, belongs to a class in which the review ordinarily is to be had in the Circuit Court of Appeals, Judicial Code, § 128. Therefore it becomes material to inquire whether the constitutional questions said to be involved are adequate to bring the case within the exceptional provision in § 238 for a review by this Court on direct writ of error.

The grounds advanced for invoking such a review are:

1. The conviction in the District of South Dakota was in violation of the provision in the Sixth Amendment to the Constitution entitling an accused to a trial in the State and district wherein the crime was committed, because (a) the indictment definitely charged the crime as committed in the Northern District of Iowa; (b) if the indictment did not so charge, it was uncertain in that it did not show whether the place of the crime was in one district or in the other, and (c) there was no evidence that the place was in the District of South Dakota.

2. The charging part of the indictment was so indefinite and ambiguous that the accused was not informed of the nature of the accusation as required by the same Amendment.

3. On the trial hearsay evidence was admitted over the accused's objection that its admission would be in derogation of his right under that Amendment to be confronted with the witnesses against him.

4. Contrary to the Fifth Amendment the accused was held to answer for an infamous crime otherwise than on an indictment by a grand jury, in that on the trial the court, being of opinion that part of what was charged in the indictment had no support in the evidence, withdrew that part from the jury and left them free to convict on what remained without a resubmission to a grand jury.

When these contentions are stated without more some of them appear to present serious constitutional ques-

tions, but it is quite otherwise when they are examined in connection with pertinent portions of the record and in the light of prior decisions.

The indictment contained several counts. All related to the same scheme to defraud, but each charged a distinct use of the mail for the purpose of executing the scheme. There were three defendants. Two were acquitted on all counts. Salinger, the other defendant, was convicted on the seventh count and acquitted on the others. His conviction on that count is what we are asked to review, the assignments of error being unusual in number and directed against almost everything done in the case.

The offense charged in that count was that the defendants devised a described scheme to defraud and, for the purpose of executing it, knowingly caused a letter to be delivered by the mail, according to the direction thereon, at Viborg, in the District of South Dakota, the letter and the direction being set forth. Then, by way of explaining how the delivery was brought about the count further charged that the defendants had caused the letter to be placed in the post office at Sioux City, Iowa, for delivery through the mail at Viborg, South Dakota, according to the address thereon.

It is very plain that the offense charged was causing the letter to be delivered by mail in South Dakota in furtherance of the scheme, and that the proper place of trial was in the District of South Dakota, where the delivery was effected as intended. We so held in a proceeding where Salinger was resisting removal to that district for trial on this indictment. *Salinger* v. *Loisel*, 265 U. S. 224. The question hardly was debatable then, and certainly has not been an open one since. The assertion that there was no evidence of the commission of the offense in that district amounts to no more than saying that the offense charged was not proved, and

therefore that a verdict of acquittal should have been directed. But it has no bearing on the district in which the offense charged was to be tried.

Of the contention that the indictment did not conform to the constitutional provision entitling the accused to be informed of the nature of the accusation it suffices to say that after reading the indictment we think the contention is so plainly without any fair basis as to be frivolous.

The evidence which is characterized as hearsay and said to have been received in violation of the accused's right to be confronted with the witnesses against him consisted of letters, bank-deposit slips and book entries. As to many items their admission became of no moment when Salinger was acquitted on all but one of the counts and the other defendants on all. As to some the instructions to the jury prevented their admission from affecting Salinger, for the court said that as to each defendant the question of his guilt or innocence was strictly personal and that he could not be found guilty on evidence that was not traced back to him personally, nor by reason of any conduct of others for which he was not directly accountable and responsible. Of the remaining items some must be put aside as negligible for other reasons. Those deserving mention were received on the theory, not that they were admissible in themselves, but that Salinger's acts and conduct, shown by other evidence, had brought him into such relation to them as to make them admissible in connection with that evidence. To illustrate: Some of the letters, although written by persons not produced as witnesses, were shown to have been laid before Salinger and answered by him; and on this ground they were admitted along with the answers. Evidence equally potent in showing his relation to other material items underlay their admission. Thus the challenged evidence was received, not as having merely a hearsay status, but because proved acts or conduct of Salinger had brought

him into such relation to it as to make it more than hearsay as to him.

The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions. *Mattox* v. *United States,* 156 U. S. 237, 243; *Robertson* v. *Baldwin,* 165 U. S. 275, 281–282; *Kirby* v. *United States,* 174 U. S. 47, 61; *Dowdell* v. *United States,* 221 U. S. 325, 330. The present contention attributes to the right a much broader scope than it had at common law, and could not be sustained without departing from the construction put on the constitutional provision in the cases just cited.

Plainly the question in respect of confrontation is not of any substance.

The contention that the court, by withdrawing from the jury a part of the charge as without support in the evidence, amended the indictment and thereby prevented it from longer serving as an accusation by a grand jury is on no better plane than the others. The indictment was not amended, either actually or in legal effect. It remained just as it was returned by the grand jury, and the trial was on the charge preferred in it and not on a modified charge. After the evidence was put in, the accused, believing that part of the charge had no support in the evidence, requested that that part be withdrawn from the jury; and the court acceded to the request when the final instructions were given. The scheme to defraud as set forth in the indictment was manifold in that it comprehended several relatively distinct plans for fleecing intended victims. What the court withdrew from the jury was all of these plans but one. Thus the court ruled that the evidence while tending to sustain the charge as respects one of the plans did not give it any

support as respects the others. Whether this was right or wrong—as to which we intimate no opinion—it did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." *Goto* v. *Lane*, 265 U. S. 393; *State* v. *Evans*, 40 La. Ann. 216, 218. And see *Crain* v. *United States*, 162 U. S. 625, 636; *Hall* v. *United States*, 168 U. S. 632, 638–639. In the case of *Ex parte Bain*, 121 U. S. 1, on which the accused relies, there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied.

We are of opinion that the constitutional questions advanced to secure the direct writ of error are all so wanting in substance that they afford no basis for the writ.

As the writ was allowed before the Act of February 13, 1925, c. 229, 43 Stat. 936, the case must be transferred to the Circuit Court of Appeals under the Act of September 14, 1922, c. 305, 42 Stat. 837, which, although repealed by the Act of 1925, is to be applied, under the terms of the saving clause, to proceedings for the review of judgments rendered theretofore.

Transferred to Circuit Court of Appeals.

UNITED STATES v. BRIMS ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 212. Argued October 8, 1926.—Decided November 23, 1926.

1. A conspiracy of manufacturers of mill-work, building contractors, and union carpenters, to check competition from non-union-made

mill-work coming from other States, to accomplish which the manufacturers and contractors were to employ only union carpenters, who would refuse to install the non-union mill-work, is a violation of the Anti-Trust Act. P. 551.

2. It is a matter of no consequence that the purpose was to shut out non-union mill-work made within the State as well as that made without. P. 552.
3. The crime of restraining interstate commerce through combination is not condoned by inclusion of intrastate commerce as well. P. 553.
4. Upon certiorari, when the grounds of the Circuit Court of Appeals for reversing the District Court are found erroneous, this Court may reverse the judgment and remand the case to the Circuit Court of Appeals for examination of the other assignments of error which it did not pass upon. P. 553.

6 F. (2d) 98, reversed.

CERTIORARI (269 U. S. 545) to a judgment of the Circuit Court of Appeals reversing a conviction under the Sherman Act.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Messrs. Rush H. Williamson* and *William D. Whitney,* Special Assistants to the Attorney General, were on the brief, for the United States.

Mr. Charles Maitland Beattie, with whom *Messrs. Joseph O. Carson* and *Robert R. Nevin* were on the brief, for Brims and other respondents designated as Union Defendants.

Messrs. Robert W. Childs and *Albert Fink* for the respondents designated as Millmen Defendants, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondents were charged with engaging in a combination and conspiracy to restrain interstate trade and commerce contrary to inhibitions of the Sherman Act, c. 647, 26 Stat. 209, and were found guilty by a jury. The Cir-

cuit Court of Appeals reviewed and reversed the judgment of conviction upon the sole ground of fatal variance between allegation and proof, or failure of proof to support the charge. 6 Fed. (2d) 98. They said—

"The indictment charged defendants with 'combining or conspiring to prevent manufacturing plants located outside of the City of Chicago and in other States than Illinois from selling and delivering their building material in and shipping the same to said City of Chicago.' . . . The proof, however, disclosed merely an agreement between defendants whereby union defendants were not to work upon nonunion-made millwork. . . . The agreement which the defendants entered into merely dealt with millwork which was the product of nonunion labor. It mattered not where the millwork was produced, whether in or outside of Illinois, if it bore the union label. The restriction was not against the shipment of millwork into Illinois. It was against nonunion-made millwork produced in or out of Illinois. We find no evidence which would support a finding that the agreement embodied in Article 3 of Section 3 was not the real agreement of the parties. Wherefore, we conclude there is a fatal variance and the evidence does not sustain the indictment."

They considered no other objection to the judgment of conviction, and the cause came here by certiorari because that point seemed to require further examination. We think it was wrongly decided.

The challenged combination and agreement related to the manufacture and installation in the City of Chicago of building material commonly known as millwork, which includes window and door fittings, sash, baseboard, molding, cornice, etc., etc. The respondents were manufacturers of millwork in Chicago, building contractors who purchase and cause such work to be installed, and representatives of the carpenters' union whose members are employed by both manufacturers and contractors.

It appears that the respondent manufacturers found their business seriously impeded by the competition of material made by nonunion mills located outside of Illinois—mostly in Wisconsin and the South—which sold their product in the Chicago market cheaper than local manufacturers who employed union labor could afford to do. Their operations were thus abridged and they did not employ so many carpenters as otherwise they could have done.

They wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install nonunion-made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The nonunion mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of buildings was increased; and, as usual under such circumstances, the public paid excessive prices.

The allegations of the bill were sufficient to cover a combination like the one which some of the evidence tended to show. It is a matter of no consequence that the purpose was to shut out nonunion millwork made

within Illinois as well as that made without. The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well. The applicable principles have been sufficiently indicated in *Montague & Co.* v. *Lowry,* 193 U. S. 38; *Loewe* v. *Lawlor,* 208 U. S. 274; *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, 612; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310.

To explore the record and pass upon all other assignments of error presented to the court below would require unreasonable consumption of our time. We may properly require its view in respect of them.

An order will be entered reversing the judgment of the Circuit Court of Appeals and remanding the cause to that court for further proceedings in harmony with this opinion.

Reversed.

Mr. Justice Stone took no part in the consideration or decision of this cause.

FEDERAL TRADE COMMISSION *v.* WESTERN MEAT COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THATCHER MANUFACTURING COMPANY *v.* FEDERAL TRADE COMMISSION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SWIFT & COMPANY *v.* FEDERAL TRADE COMMISSION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 96, 213, 231. Argued October 25, 26, 1926.—Decided November 23, 1926.

Section 7 of the Clayton Act, October 15, 1914, forbids corporations engaged in interstate commerce to acquire stock of other corporations, so engaged, where the effect may be substantially to lessen competition between them or to restrain such commerce or tend to create a monopoly in it. Section 11 authorizes the Federal Trade Commission to enforce this, as respects corporations other than common carriers, banks and trust companies, and empowers it to order a corporation found violating it to "cease and desist from such violations, and divest itself of the stock held," etc. *Held*,

1. When a corporation has unlawfully acquired all the stock of a competitor, but not its plant or other property, the order properly directs it to divest itself of the stock ownership in such wise as will restore competition, and not leave the corporation in control of the competitor's property, as would happen if it first used the stock to secure such control, and then divested itself of the stock by dissolving the other corporation. P. 557.
2. But where a corporation unlawfully buys its competitor's stock and through it acquires the competitor's property, before the Commission takes action, the Commission is not empowered by the statute to order the corporation to divest itself of the property;

but the remedy, if an unlawful status has resulted, is in the Courts, under the Sherman Act. Pp. 560, 561.

4 F. (2d) 223, modified and affirmed.

5 F. (2d) 615, affirmed in part, reversed in part.

8 F. (2d) 595, reversed.

CERTIORARI (268 U. S. 685; 269 U. S. 546; 269 U. S. 548) to review decrees of the Circuit Court of Appeals in proceedings taken in that court under the Federal Trade Commission and Clayton Acts.

No. 96 was a petition by the Western Meat Company to review an order of the Commission requiring the company to divest itself of stock of a competing corporation. The Commission's order was affirmed, with a modification; and the decree is here affirmed with the modification eliminated.

No. 213 was a petition by the Commission to the court below, to enforce a similar order against Thatcher Manufacturing Company. The decree of the court below is here reversed, in so far as it sustained the order.

No. 231 was a petition by Swift & Company to review a similar order. The decree of the court below sustaining the order is here reversed.

Mr. Adrien F. Busick, with whom *Messrs. Bayard T. Hainer* and *James M. Brinson* were on the brief, for the petitioner in No. 96 and the respondent in Nos. 213 and 231.

Mr. Edward I. Barry, with whom *Messrs. Frank L. Horton, Jeremiah F. Sullivan,* and *Theo. J. Roche* were on the brief, for the respondent in No. 96.

Mr. Herbert Knox Smith for the petitioner in No. 213.

Mr. James M. Sheean, with whom *Messrs. Albert H. Veeder, Henry Veeder,* and *Frank L. Horton* were on the brief, for the petitioner in No. 231.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

I

These causes necessitate consideration of the power of the Federal Trade Commission where it finds that one corporation has acquired shares of a competitor contrary to the inhibition of the Clayton Act, approved October 15, 1914, c. 323, 38 Stat. 730, 731. That Act provides—

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. . . ."

Section 8 forbids interlocking directors.

"SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where ap-

plicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint . . . If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person ["person" includes corporation] an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. . . ."

Section 5 of the Act to create a Federal Trade Commission, approved September 26, 1914, c. 311, 38 Stat. 717, 719, declares unfair methods of competition in commerce unlawful, prescribes the procedure to be followed, and gives the Commission power to require an offending party to cease and desist from such methods. This section is not presently important; the challenged orders sought to enforce obedience to § 7 of the Clayton Act.

II

No. 96. The Western Meat Company, a California corporation, and the Nevada Packing Company, of Nevada, were interstate competitors engaged in manufacturing, selling, and distributing meat products. December 30, 1916, the former purchased all stock of the latter and has continued to hold it. In a proceeding begun November 24, 1919, the Commission found such purchase and con-

tinued ownership contrary to law and entered an order directing—

"That the respondent, Western Meat Company, shall forthwith cease and desist from violating the provisions of Section 5 of said Act of Congress approved September 26, 1914, entitled, 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and also the provisions of Section 7 of said Act of Congress approved October 15, 1914, entitled, 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' and particularly to so divest itself absolutely of all capital stock of the Nevada Packing Company as to include in such divestment the Nevada Packing Company's plant and all property necessary to the conduct and operation thereof as a complete, going packing plant and organization, and so as to neither directly or indirectly retain any of the fruits of the acquisition of the capital stock of said Nevada Packing Company, a corporation.

"That in such divestment, no stock or property above mentioned to be divested shall be sold or transferred, directly or indirectly, to any stockholder, officer, director, employee, or agent of, or anyone otherwise directly or indirectly connected with or under the control or influence of, respondent or any of its officers, directors, or stockholders or the officers, directors or stockholders of any of respondent's subsidiaries or affiliated companies."

The court below held this order went beyond the Commission's authority and directed that it be modified by eliminating "the injunction against the acquisition by the petitioner of the plant and property of the Nevada Packing Company."

Respondent maintains that the Commission's authority is strictly limited by the statute and that where there has been an unlawful purchase of stock it can do no more than enter "an order requiring such person to cease and

desist from such violations and divest itself of the stock held." Also, that the Commission has no power to prevent or annul the purchase of a competitor's plant and business, as distinguished from stock therein. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174; *Federal Trade Commission* v. *Beech-nut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475, are relied upon.

Without doubt the Commission may not go beyond the words of the statute properly construed, but they must be read in the light of its general purpose and applied with a view to effectuate such purpose. Preservation of established competition was the great end which the legislature sought to secure.

The order here questioned was entered when respondent actually held and owned the stock contrary to law. The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. And the same result would follow a transfer to one controlled by or acting for the respondent.

Although the respondent held all the capital stock, the plant and other property of the Nevada Packing Company had not been acquired. The Commission directed that it so divest itself of all this stock as to include in such divestment the Packing Company's plant and property necessary to the operation thereof, etc. Taken liter-

ally, this goes beyond the situation revealed by the record, but the order must be construed with regard to the existing circumstances. Divestment of the stock must be actual and complete and may not be effected, as counsel for respondent admitted was intended, by using the control resulting therefrom to secure title to the possessions of the Packing Company and then to dissolve it. Properly understood, the order was within the Commission's authority, and the court below erred in directing the elimination therefrom of the above-quoted words. Its decree must be modified accordingly and then affirmed.

Modified and affirmed.

III

No. 213. The Commission entered complaint against the petitioner, March 1, 1921, and charged that the latter contrary to § 7 of the Clayton Act, first acquired the stock of four competing corporations—Lockport Glass Company, Essex Glass Company, Travis Glass Company and Woodbury Glass Company—and thereafter took transfers of all the business and assets of the first three and caused their dissolution, October 20, 1920, December 18, 1920, and January 13, 1921, respectively. Having found the facts concerning a rather complicated series of transactions, the Commission ruled that the acquisitions of all these stocks were unlawful and ordered the petitioner to cease and desist from ownership, operation, management and control of the assets, properties, rights, etc., of the Lockport, Essex and Travis Glass companies secured through such stock ownership, and to divest itself of the assets, properties, rights, etc., formerly held by them. Also, that it should divest itself of the stock of the Woodbury Glass Company.

The court below held that the last-named company was not in competition with petitioner within the meaning of the statute and modified the order accordingly. Therein we agree and to that extent affirm its decree.

The court further ruled, in effect, that as the stocks of the remaining three companies were unlawfully obtained and ownership of the assets came through them, the Commission properly ordered the holder so to dispossess itself of the properties as to restore prior lawful conditions. With this we cannot agree. When the Commission institutes a proceeding based upon the holding of stock contrary to § 7 of the Clayton Act, its power is limited by § 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it. The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto. If purchase of property has produced an unlawful status a remedy is provided through the courts. Sherman Act, c. 647, 26 Stat. 209; Act to Create a Federal Trade Commission, c. 311, § 11, 38 Stat. 717, 724; Clayton Act, c. 323, §§ 4, 15, 16, 38 Stat. 730, 731, 736, 737; *United States* v. *American Tobacco Co.*, 221 U. S. 106. The Commission is without authority under such circumstances.

Affirmed in part; reversed in part.

IV

No. 231. A complaint against petitioner, filed November 24, 1919, charged that in 1917 and 1918 it had unlawfully obtained stock in two competing companies—Moultrie Packing Company and Andalusia Packing Company—and, thereafter, through the use of this, obtained title to their business and physical property. The findings support the charge. The Commission ordered—

That respondent, Swift & Company, within six calendar months from and after the date of the service of a copy of this order upon it, shall:

(1) Cease and desist from further violating Section 7 of the Clayton Act by continuing to own or hold, either directly or indirectly, by itself or by any one for its use and benefit, any of the capital stock of the Moultrie Packing Company and of the Andalusia Packing Company, or either of them, and cease and desist from holding, controlling and/or operating, or causing to be held, controlled and/or operated by others for its use and benefit, the former property and business either of the said Moultrie Packing Company or of the said Andalusia Packing Company, which have been held, controlled and operated by respondent and its employes and agents, following and as a result of respondent's unlawful acquisition of the capital stocks of said named corporations; and to that end, respondent shall

(2) So divest itself of all the capital stocks heretofore acquired by respondent, including all the fruits of such acquisitions, in whatever form they now are, whether held by respondent or by any one for its use and benefit, of the Moultrie Packing Company, a corporation, and of the Andalusia Packing Company, a corporation, or either of them, in such manner that there shall not remain to respondent, either directly or indirectly, any of the fruits of said acquisitions, including the control and/or operations of said corporations, or either of them, resulting from such acquisitions and/or holdings of such capital stocks.

(3) In so divesting itself of such capital stocks respondent shall not sell or transfer, either directly or indirectly, any of such capital stocks to any officer, director, stockholder, employe or agent of respondent, or to any person under the control of respondent, or to any partnership or

corporation either directly or indirectly owned or controlled by respondent.

The court below denied a petition for review and the matter is here by certiorari. As all property and business of the two competing companies were acquired by the petitioner prior to the filing of the complaint, it is evident that no practical relief could be obtained through an order merely directing petitioner to divest itself of valueless stock. As stated in number 213, we are of opinion that under §§ 7 and 11 of the Clayton Act the Commission is without authority to require one who has secured actual title and possession of physical property before proceedings were begun against it to dispose of the same, although secured through an unlawful purchase of stock. The courts must administer whatever remedy there may be in such situation. The order of the Commission should have been reviewed and set aside; and judgment to that effect will be entered here.

Reversed.

MR. JUSTICE BRANDEIS, dissenting in part.

In my opinion, the purpose of § 7 of the Clayton Act was not, as stated by the Court, merely "to prevent continued holding of the stock and the peculiar evils incident thereto." It was also to prevent the peculiar evils resulting therefrom. The institution of a proceeding before the Commission under § 7 does not operate, like an injunction, to restrain a company from acquiring the assets of the controlled corporation by means of the stock held in violation of that section. If, in spite of the commencement of such a proceeding, the company took a transfer of the assets, the Commission could, I assume, require a retransfer of the assets, so as to render effective the order of divestiture of the stock. I see no reason why it should not, likewise, do this although the company succeeded in securing the assets of the controlled corporation before

the Commission instituted a proceeding. Support for this conclusion may be found in § 11, which provides for action by the Commission whenever it "shall have reason to believe that any person is violating *or has violated* any of the provisions" of the earlier sections. (Italics ours.)

I think that the decrees in Nos. 213 and 231 should be affirmed.

The CHIEF JUSTICE, MR. JUSTICE HOLMES and MR. JUSTICE STONE join in this dissent.

PORT GARDNER INVESTMENT COMPANY *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 173. Argued December 9, 1925; reargued October 19, 20, 1926.—Decided November 23, 1926.

The prosecution with effect, under § 26, Title II, of the National Prohibition Act, of the driver of an automobile, for illegal possession and transportation of liquor therein, makes it mandatory to dispose of the vehicle as prescribed by that section, and precludes resort to forfeiture proceedings under Rev. Stats. § 3450. P. 566.

Response to question certified by the Circuit Court of Appeals upon a review by writ of error of a judgment of the District Court forfeiting an automobile under Rev. Stats. § 3450.

Mr. Duane R. Dills, with whom *Messrs. Loren Grinstead, William T. Laube, James A. Laughlin,* and *Thomas E. Davis* were on the brief, for the Port Gardner Investment Company.

Assistant Attorney General Willebrandt for the United States, in the original argument. *Solicitor General Mitchell* for the United States on the reargument. *Mr. Mahlon D. Kiefer,* Special Assistant to the Attorney General, was also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a proceeding, commenced in the federal court for western Washington, Northern Division, under Revised Statutes of the United States, § 3450, to forfeit an automobile on the ground that it was being used with intent to defraud the United States of the tax on distilled spirits found therein. The use alleged was in removal and for the deposit and concealment. The claimant intervened in the district court, asserted title to the automobile and denied knowledge or notice, prior to the seizure, that the automobile was being used or was to be used in any illegal manner. The case comes here on certificate from the Circuit Court of Appeals for the Ninth Circuit, that court having heard the case on writ of error to the district court, which had entered a decree of forfeiture. Six questions are presented by the certificate. The fifth is: "Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the government to proceed under § 26 of that Act and thereby prevent the forfeiture of the car under § 3450 of the Revised Statutes of the United States?"

The facts are these. Neadeau, the driver of the automobile seized by prohibition agents, had been charged with possession and transportation of intoxicating liquor in violation of the National Prohibtion Act. He pleaded guilty to both charges and was sentenced to pay a fine. The claimant insisted that this proceeding under § 3450 would not lie. In addition to the objections considered in *United States* v. *One Ford Coupe Automobile, ante*, p. 321, the claimant contended that the Government should not prevail, because the plea of guilt followed by the sentence constitutes a prior conviction under § 5 of the Willis-Campbell Act, which provides that "if any act is a violation of" any tax law concerning intoxicating

liquors and also of the National Prohibition law, or the supplement thereto, "a conviction for such act or offence under one shall be a bar to prosecution therefor under the other." The argument is that under § 26 no separate action is taken to forfeit the vehicle; that forfeiture is an incident of the conviction of the person which operates as a forfeiture also of the vehicle taken possession of, subject only to the right of the innocent third party to establish his lien or other interest; and that the order of sale is merely a step in the execution of the judgment of conviction and forfeiture. It is argued further that the term "act," as used in § 5, means transaction; and that for this reason, independently of the doctrine of election, a conviction of the person under § 26 will bar the proceeding under § 3450 because, on the facts recited in the certificate, the proceeding to forfeit under § 3450 rests upon the same transaction for which Neadeau was sentenced. Whether the principle embodied in this contention is sound we need not determine. For there is another ground on which the conviction of Neadeau under § 26 bars a proceeding to forfeit under § 3450.

The disposition of the automobile prescribed in § 26 became mandatory after Neadeau's conviction; and being inconsistent with the disposition under § 3450 necessarily precluded resort to proceedings under the latter section. Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.

We need not determine whether the mere commencement of a proceeding under § 26 constitutes an election. Nor need we give specific answers to the other questions asked, since the certificate does not disclose any reason why the sale of the automobile, subject to the interests of innocent parties, should not have been ordered by the District Court after the conviction of Neadeau.

Yes, to Question 5.

MR. JUSTICE BUTLER, concurring.

I agree that the answer to question 5 should be in the affirmative.

In the opinion it is said, "Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative." This means prosecution and conviction of the driver constitute an election to proceed against the vehicle under § 26 and prevents forfeiture under § 3450. The answer is enough to guide the Circuit Court of Appeals in this case. But it leaves open the question which is not decided in *United States* v. *Ford Coupé, ante,* p. 321. The substance of that question is whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of § 26 to proceed against the vehicle as there directed. I think he has no more right to ignore that command than he has to let the liquor and offender go. The law makes the election. I regret that this Court's answer is so qualified and restricted. Section 26 is not so restrained.

I am authorized to say that MR. JUSTICE STONE concurs in this opinion.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR, ET AL. *v.* DOUGHTON, COMMISSIONER OF REVENUE.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 49. Argued May 6, 1926.—Decided November 29, 1926.

1. A State may not subject to taxation things wholly beyond her control. P. 575.
2. The exercise of a power of appointment through a will made in North Carolina by a resident of that State, *held* not taxable there,

when the property was a trust fund in Massachusetts created by the will of a citizen of that State bestowing the power of appointment—this in view of the Massachusetts law which treats the property in such cases as passing under that law from the original donor to the appointee, and governs the interpretation of the power and its execution and the distribution of assets thereunder. P. 575.

189 N. C. 50, reversed.

Error to a judgment of the Supreme Court of North Carolina which sustained a tax upon the value of property which passed to citizens of that State under a power of appointment executed by a resident of that State, but created by the will of a resident of Massachusetts, where the property was situate.

Mr. William M. Hendren, with whom *Messrs. Clement Manly* and *B. S. Womble* were on the brief, for plaintiffs in error.

While the tax here involved is not upon property, but upon the right of succession to property, the property being considered as measuring the value of the privilege, nevertheless the same general rule as to jurisdiction is applicable. The true conception of an inheritance tax is to consider it as upon a right to receive rather than upon the right to dispose of property. At least this is the view taken of it in North Carolina. *Pullen* v. *Commissioners*, 66 N. C. 361; *Re Morris*, 138 N. C. 259; *Rhode Island Trust Co.* v. *Doughton*, 187 N. C. 263. One of the most important privileges granted by the law is that of succeeding to the property of a deceased person. A succession tax is a fee exacted by the State in payment for the service of supplying law and machinery to pass property. Only the State supplying this law can exact such payment.

The will bears, on its face, evidence that Mrs. Taylor intended it to operate under the laws of the State of Massachusetts because it is attested as required by the probate laws of Massachusetts in that it has three wit-

nesses instead of the two required by the laws of her domicile.

At common law, powers of appointment have certain well known and well settled attributes and the relations and rights of the parties are equally well known and settled. The appointee takes under the will of the donor and not under the will of the donee of the power. *White* v. *White,* 189 N. C. 236; *United States* v. *Fields,* 255 U. S. 257. The donee has no title to or estate in the appointed property. The power is a deputation of the donee to act for the donor in disposing of the donor's property. *Walker* v. *Mansfield,* 221 Mass. 600; *Shattuck* v. *Burrage,* 229 Mass. 448; *United States* v. *Fields, supra; O'Grady* v. *Wilmot* (1916) 2 A. C. 231. The law of the State of the residence of the donor of the power over personal property controls all questions as to the execution of the power and succession to the property. *Walker* v. *Mansfield, supra; Re Bowditch,* 189 Cal. 377; *Re Canda,* 189 N. Y. Supp. 917; Woerner, Law of Admr., vol. 2, p. 766. The interpretation of "will" in the instrument creating the power is for the courts of the State of the domicile of the donor. *Blount* v. *Walker,* 28 S. C. 545; *In re New York Ins. Co.,* 209 N. Y. 385. The *res* upon which the decree of the probate court of North Carolina operates is only the status of the "will" for the purpose of distributing the individual estate of Mrs. Taylor. *Blount* v. *Walker,* 134 U. S. 607; *Re Harriman,* 208 N. Y. Supp. 672.

Suppose North Carolina had, by statute, withdrawn the privilege of passing property by will, or had surrounded the right by unusual or fantastic requirements. Yet it remains that the will of Mrs. Taylor would be recognized by the law of Massachusetts and there given effect as an exercise of the power. *Higgins* v. *Eaton,* 202 Fed. 75; *Seawell* v. *Wilmer,* 132 Mass. 131; *Murphy* v. *Deichler,* (1909), A. C. 446. If the appointee can secure

his rights under the power without reference to and independently of a privilege granted by the taxing State, then there is no jurisdiction to tax.

Massachusetts, California, and New York have a statutory provision similar to that of North Carolina, as contained in the amendment of 1921. The courts of each of these States hold such an act invalid when applied to facts such as those of the instant case. *Walker* v. *Mansfield, supra; Re Bowditch, supra; Re Canda, supra.*

The law of North Carolina is not needed either practically or legally to establish the inheritance. A transfer by a gift *causa mortis*, is governed by the law of the *situs*, so there is no ground for taxing the transfer at the domicile of the decedent. The same is true in the case of appointment by will under a power which derives no force from the inheritance law of the domicile of the person exercising the power.

Mr. Dennis G. Brummitt, Attorney General of North Carolina, with whom *Mr. Frank Nash,* Assistant Attorney General, was on the brief, for defendant in error.

The power of appointment given by the will was a general power as distinguished from a special power. *Smith* v. *Gary,* 22 N. C. 42; *Rogers* v. *Hinton,* 62 N. C. 101; *Hicks* v. *Ward,* 107 N. C. 392; *Thompson* v. *Garwood,* 3 Wharton (Pa.) 287; *Dana* v. *Murray,* 122 N. Y. 604. The donee of a general power of appointment is in equity considered the owner of the property appointed as to all debts of the donee. *Smith* v. *Gary, supra; Rogers* v. *Hinton, supra*; *Thompson* v. *Garwood, supra*; *Brandies* v. *Cochrane,* 112 U. S. 344; *Manson* v. *Duncannon,* 166 U. S. 533; *United States* v. *Field,* 255 U. S. 257; *Bullen* v. *Wisconsin,* 240 U. S. 265.

Mrs. Taylor exercised the power in North Carolina after the Act of 1921 had become effective, consequently, her will executed and probated in North Carolina while she was a resident of the State, devising and bequeathing

property to only two persons, her husband and child, both of them being also residents of the State, must be taken to have been executed in the light of the provisions of the Act of 1921. *In re Morris's Estate,* 138 N. C. 259; *Stebbins* v. *Riley,* 268 U. S. 137. That Act taxes, not the property devolving under the exercise of the power of appointment, but the exercise of that power itself.

If, however, the Court should determine that the expression used, that the administrator should pay all the charges of administration, does not include inheritance taxes, then and independently of this holding, the action of the defendant in error in assessing inheritance taxes upon the succession of the property, was authorized by the statute. If the power is to appoint by will, it is necessary that the will should be executed and properly probated in order that the estate should vest in the appointee. There is nothing which would prevent the State from taxing the exercise of this privilege, as is done in the instant case. *In re Dows,* 167 N. Y. 227; *Orr* v. *Gilman,* 183 U. S. 278; *In re Delano,* 176 N. Y. 486; *Chanler* v. *Kelsey,* 205 U. S. 466.

The statute thus interpreted in no way offends against the Fourteenth Amendment to the Federal Constitution. *Orr* v. *Gilman, supra*; *Chanler* v. *Kelsey, supra*; *Bullen* v. *Wisconsin, supra*; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69.

Mr. Justice McReynolds delivered the opinion of the Court.

Stanford L. Haynes, of Springfield, Massachusetts, died May 21, 1920, leaving a will which was duly probated at that place. The fifth clause gave to the Springfield Safe Deposit & Trust Company, Massachusetts corporation, the residue of the estate in trust, one-half to be set aside and the net income paid to his daughter, Theodosia, so long as she should live, and at her death to be transferred

to "such person or persons and in such proportions as said Theodosia shall by will appoint, or in the event that said Theodosia shall fail to exercise the power of appointment hereby conferred upon her and shall leave issue surviving her, such payment and transfer shall be made to such issue by right of representation." The corporation accepted the trust and received a large fund.

After her father's death Theodosia intermarried with Taylor and resided at Morgantown, North Carolina. She died there June 23, 1921, leaving an infant child. By will dated March 18, 1921, executed in North Carolina and adequate under the laws of that State and of Massachusetts, she directed that the property described by the fifth clause of her father's will should be divided between her husband and child. She also disposed of some land and personal property in North Carolina. The will was duly probated in the latter State and plaintiff in error became administrator of the estate. The fund held by the Trust Company and subject to appointment was made up of stocks and bonds valued at $395,279.93.

Section 6, c. 34, Public Laws N. C. 1921, ratified March 8, 1921, directs that all real and personal property passing by will or the intestate laws of the State shall be subject to a tax, and—"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this Act, such appointment when made shall be deemed a transfer taxable under the provisions of this Act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time

provided therefor, in whole or in part, a transfer taxable under the provisions of this Act shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Acting under this statute, the proper officer demanded payment of a tax computed upon the value of the property which passed under the appointment by Mrs. Taylor. The Supreme Court—N. C.—approved the demand and specifically held that enforcement would not offend the Fourteenth Amendment by depriving the interested parties of property without due process of law. It declared that the statute taxed the exercise of the power of appointment made by permission and under direct protection of local laws. 189 N. C. 50.

In *Orr* v. *Gilman,* 183 U. S. 278, and *Chanler* v. *Kelsey,* 205 U. S. 466, this Court held that by an Act passed subsequent to the instrument which created a power of appointment New York might tax its execution without violating the Fourteenth Amendment. But in each of these causes the first testator, or creator of the trust, and the trustees thereunder were residents of New York and the fund was there held. Here the original testator resided in Massachusetts, his will was probated there, and the trustee holds the funds there for disposition under the local laws. The power of appointment was exercised by a resident of North Carolina by a will there executed and that State has attempted to impose the tax. These circumstances differentiate the causes.

In *Chanler* v. *Kelsey,* the statute, c. 284 N. Y. Laws 1897, provided—"Whenever any person or corporation shall exercise the power of appointment derived from any

disposition of property made either before or after the passage of this Act, such appointment when made shall be deemed a transfer taxable under the provisions of this Act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this Act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Mrs. Delano, acting under the power granted by her father, appointed by her will those who should take the full beneficial interest in property held by trustees in New York and actually located there. The New York court held that the tax was upon the exercise of the power by will as an effective transfer within the purposes of the Act, and this Court said: "The Court of Appeals of New York had the exclusive right to construe instruments of title in that State and determine for itself the creation and vesting of estates through wills under the laws of the State." "That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will."

Except perhaps where the instrument which created the power provides that the appointment must be by will

executed according to the law of the donee's domicile, to be proved and allowed there, the following propositions are established in Massachusetts: "Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power." The appointee takes, not as the legatee of him who appoints, but of the original donor. "Property in the hands of domestic trustees appointed under the will of a domestic testator, who conferred a power of appointment upon a non-resident, must be distributed according to the law of this Commonwealth and . . . the execution of the power must be interpreted according to our law and in conformity to the power conferred." *Walker* v. *Treasurer & Receiver General,* 221 Mass. 600, 602, 603, and cases there cited; *Shattuck* v. *Burrage,* 229 Mass. 448. These principles are commonly accepted. *Blount* v. *Walker,* 134 U. S. 607; *United States* v. *Field,* 255 U. S. 257, 264; *Murphy* v. *Deichler,* House of Lords L. R. (1909), A. C. 446; *In re Harriman's Estate,* 208 N. Y. S. 672; *Matter of New York Life Insurance & Trust Co.,* 209 N. Y. 585; *Bingham's Appeal,* 64 Pa. St. 345; *Rhode Island Trust Co.* v. *Dunnell,* 34 R. I. 394; *Prince de Bearn* v. *Winans,* 111 Md. 434; *State ex rel. Bankers' Trust Co.* v. *Walker,* 70 Mont. 484; *Estate of Bowditch,* 189 Cal. 377.

We think the assets of the trust estate established by the will of Haynes had no *situs,* actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control. *Frick* v. *Pennsylvania,* 268 U. S. 473.

The judgment below must be

Reversed.

MR. JUSTICE HOLMES.

In *Bullen* v. *Wisconsin,* 240 U. S. 625, where a fund was given in trust for the donor's widow and children, reserving to the donor a general power of revocation and the disposition of the income during his life, it was held that upon his death an inheritance tax could be levied in Wisconsin, the place of his domicile, although the trustee and trust fund were outside of the jurisdiction. The general power was considered to have the same effect as ownership. In this case the power was not so broad, because it was to be executed only by will; but the command over the fund was substantially the same. Mrs. Taylor, the donee, had the life interest and the power to dispose of the remainder by a will which she could bind herself to make. I dare say that it may be desirable to limit the *universitas* as was done in *Frick* v. *Pennsylvania,* 268 U. S. 473, but I cannot help doubting whether the present decision can be reconciled with *Bullen's* case.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this view.

OTTINGER, ATTORNEY GENERAL OF NEW YORK, *v.* CONSOLIDATED GAS COMPANY OF NEW YORK.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 357. Argued October 18, 19, 1926.—Decided November 29, 1926.

An Act of New York, c. 899, (1923), prescribing a gas rate of one dollar per thousand feet, *held* confiscatory. P. 579.
6 F. (2d) 243, modified and affirmed.

APPEAL from a judgment of the District Court enjoining enforcement of a New York rate-fixing statute, in a suit brought by the Gas Company against the Attorney

General of the State and the New York Public Service Commission.

Mr. John Holley Clark, Jr., with whom *Messrs. Albert Ottinger,* Attorney General of New York, *William Hayward,* and *Charles E. Buchner* were on the brief, for appellant.

Messrs. John A. Garver and *William L. Ransom* for appellee.

Mr. Justice McReynolds delivered the opinion of the Court.

In *Newton* v. *Consolidated Gas Company,* 258 U. S. 165, decided March 6, 1922, this Court held that Chapter 125, New York Laws 1906, which prescribed an eighty cent per thousand feet gas rate, had become confiscatory and should not be enforced. Thereafter the New York Public Service Commission made careful investigation of the property and operations of appellee and prescribed a rate not exceeding one dollar and fifteen cents per thousand for gas of five hundred and thirty-seven British thermal units, effective October 1, 1922, to continue for one year. Acceptance of this order, the company now claims, consummated a binding agreement with the State. The Legislature, by an Act approved June 2, 1923, c. 899, Laws 1923, effective immediately, directed that thereafter in New York City not more than one dollar per thousand feet should be demanded for gas of six hundred and fifty British thermal units.

By an original bill in the United States District Court, Southern District of New York, wherein the Public Service Commission and the Attorney General of that State were the defendants, appellee attacked the Act of June 2, 1923, as confiscatory and prayed for an injunction prohibiting enforcement thereof. It also asked that the Act be adjudged void because enforcement would impair the

company's contract with the State under the Commission's order, contrary to Article I, Section 10, of the federal Constitution. Further, that the Act be declared invalid because of the impossibility of supplying immediately and with safety to consumers gas of six hundred and fifty thermal units. Answers followed and the matter went to a master, who took much proof, found the value of the property dedicated to public use, cost of operation, the impossibility of furnishing safely gas of the prescribed standard, etc. He reported the one dollar rate would not yield a fair return upon such property estimated according to any reasonable standard and, therefore, recommended that the Act be declared confiscatory and unenforcible. He further recommended that it be declared invalid because in conflict with Article I, Section 10, also because compliance therewith was practically impossible. The court confirmed this report without material modification, adjudged as recommended and granted the injunction prayed for. 6 Fed. (2d) 243.

The Commission, wisely we think, declined to ask review here of the final decree. The Attorney General sued out a broad, separate appeal. His petition therefor alleges: "That in substance the decree restrains the defendants from enforcing in any way Chapter 899 of the Laws of 1923 of the State of New York and declares that said statute violates or is in contravention of Section 10 of Article I and of the Fourteenth Amendment of the Constitution of the United States." There is an enormous record. Seventy-one assignments of error assail rulings of the court and question many of the master's actions and conclusions.

Although somewhat oracular—as in the lines which make solemn declaration concerning the position which this court must ultimately take regarding valuations in rate cases—and too much burdened with unimportant dissertations, the report of the master contains a valuable analysis of the relevant evidence and clear statements

concerning values. It also sets out distinctly what the evidence discloses as to the cost of production, expenses of the business, etc. He concluded that the prescribed rate of one dollar per thousand feet would not yield a return of six per centum and was therefore confiscatory. With this conclusion the court below agreed, and we find nothing whatever suggested by the Attorney General in brief or oral argument which would justify material modification or reversal of the final decree in so far as it so adjudges and directs appropriate injunctions.

As the statute is clearly confiscatory and therefore invalid under the Fourteenth Amendment, it was unnecessary for the trial court to consider other objections thereto, and we have not done so.

The decree of the District Court will be modified by excluding therefrom those parts which declare the Act invalid for any reason except that enforcement would result in confiscation. Thus modified, it is affirmed. All costs of the appeal will be taxed against appellant.

Affirmed with modification.

MR. JUSTICE BRANDEIS concurs in the result.

OTTINGER, ATTORNEY GENERAL OF NEW YORK, *v.* BROOKLYN UNION GAS COMPANY.

OTTINGER, ATTORNEY GENERAL OF NEW YORK, *v.* KINGS COUNTY LIGHTING COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Nos. 358, 365. Argued October 18, 19, 1926.—Decided November 29, 1926.

An Act of New York, c. 899, (1923), prescribing a gas rate of one dollar per thousand feet, *held* confiscatory. P. 581.

7 F. (2d) 192; *Id.* 628, modified and affirmed.

APPEALS from decrees of the District Court enjoining enforcement of a New York rate-fixing statute, in suits by the Brooklyn Union Gas Company and the Kings County Lighting Company against the Attorney General of the State and the New York Public Service Commission.

Mr. John Holley Clark, Jr., with whom *Messrs. Albert Ottinger*, Attorney General of New York, *William Hayward, Charles E. Buchner*, and *Anthony P. Ludden* were on the briefs, for appellant.

Mr. William N. Dykman, with whom *Mr. Jackson A. Dykman* was on the brief, for the Brooklyn Union Gas Co.

Mr. Samuel F. Moran, with whom *Mr. John D. Monroe* was on the brief, for the Kings County Lighting Co.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Separate suits were begun by appellees in the United States District Court, Eastern District of New York, against the Public Service Commission and the Attorney General of that State. They sought injunctions against enforcement of the Act of June 2, 1923, c. 899, Laws of New York 1923, by which the Legislature directed that gas of six hundred and fifty British thermal units should be sold at not more than one dollar per thousand feet. Prior to June 2, 1923, under orders of the Commission, the Brooklyn Union Gas Company had been charging one dollar and fifteen cents and the Kings County Lighting Company one dollar and thirty cents per thousand feet for gas of five hundred and thirty-seven British thermal units.

The causes were referred to different masters. They took much evidence, and each reported that the rate prescribed by the Legislature would yield less than five per centum upon the fair value of the complainants' property devoted to public use. With some exceptions, not now

important, these reports were approved and the court adjudged the statute confiscatory and therefore invalid. Also, that it was unreasonable and invalid in respect of the standard of six hundred and fifty British thermal units. 7 Fed. (2d) 192, 628.

The Commission declined to ask for an appeal to this court. The Attorney General, upon petitions which allege "that in substance the decree restrains the defendants from enforcing in any way Chapter 899 of the Laws of 1923 of the State of New York and declares that said statute violates or is in contravention of Section 10 of Article I and of the Fourteenth Amendment of the Constitution of the United States," sued out broad appeals and has presented many assignments of error—one hundred and seven in No. 358, and twenty-one in No. 365. But we find no reason whatever advanced by him in brief or oral argument which would justify reversal of either decree.

The statute was clearly confiscatory in effect and there was no necessity for the District Court to consider any other objection thereto. We have not done so.

The decrees will be modified by excluding therefrom such parts as adjudge the statute invalid for any reason except conflict with the Fourteenth Amendment because confiscatory in effect. Thus modified, both are affirmed. All costs will be taxed against appellant.

Affirmed as modified.

MR. JUSTICE BRANDEIS concurs in the result.

LAMBERT v. YELLOWLEY ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 47. Argued April 30, 1926.—Decided November 29, 1926.

1. The provision of the National Prohibition Act that "Not more than a pint of spirituous liquor to be taken internally shall be

prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once," is "appropriate legislation," within the meaning of the Eighteenth Amendment for enforcing its prohibition of the manufacture, sale, and transportation of intoxicating liquor for beverage purposes. P. 589.

2. Whatever the belief of a physician in the medicinal value of alcoholic liquor, his right to administer it to patients is subordinate to the powers granted to Congress by the Eighteenth Amendment. P. 596.

4 F. (2d) 915, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which reversed a decree of the District Court (291 Fed. 640), enjoining Yellowley, a prohibition director, and other officials, from interfering with the plaintiff, Dr. Lambert, in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes in quantities exceeding the limits fixed by the National Prohibition Act.

Messrs. Joseph S. Auerbach and *Martin A. Schenck*, with whom *Miss Emily C. Holt* was on the brief, for appellant.

The Eighteenth Amendment, in prohibiting the use of intoxicating liquor for beverage purposes, does not prohibit, or delegate the power to prohibit, medicinal use. Limitations are inherent in the terms of the Amendment; manufacture, sale, transportation, importation, and exportation. The prescription of alcoholic liquor for medicinal purposes was a long recognized relationship. Such relationship is not prohibited and is not inferentially to be included within any of the five specified prohibited relationships. The Amendment contains a further clearly defined limitation which modifies and controls each of the five definite classes of prohibited relationships. They are prohibited for one specific class of purpose. They are prohibited only "for beverage purposes."

It would have been easy to express a general and sweeping prohibition. The mentioning of the specific purpose is solely as a limitation. Where the remainder of the sub-

ject matter is left in other jurisdictions, the granting of power to Congress under this phraseology is necessarily a limitation to the purpose expressed. For example, industrial use is not prohibited. And it has been well held that there is "nothing in the Eighteenth Amendment grounding such power" to prohibit industrial use and that the use of alcohol for non-beverage purposes is a right protected by due process of law. *McGill* v. *Mellon,* 5 F. (2d) 262. Powers of definition and regulation present quite another question. *Selzman* v. *United States,* 268 U. S. 466. At the time of the drafting and ratification of the Amendment, the term "beverage purpose" in prohibition legislation had a generally accepted meaning. Beverage purpose was the antithesis of medicinal use. *Commonwealth* v. *Mandeville,* 142 Mass. 469; *Gue* v. *Eugene,* 53 Ore. 282; *State* v. *Roach,* 75 Me. 123; *State* v. *Costa,* 78 Vt. 198; *Bowman* v. *State,* 38 Tex. Cr. 14; *Thomasson* v. *State,* 15 Ind. 449; *State* v. *Larrimore,* 19 Mo. 391; *Sarrls* v. *Commonwealth,* 83 Ky. 327; *Nixon* v. *State,* 76 Ind. 524.

The Amendment sets forth a third separate class of limitation. The enforcement of the powers delegated under § 1 must, in accordance with § 2, be by appropriate legislation. This incorporates in the amendment the doctrine laid down by this Court that Congress cannot, in the exercise of the powers thus carefully limited, under the guise of enforcement, extend its powers to matters inappropriate. *United States* v. *Harris,* 177 U. S. 305; *National Prohibition Cases,* 253 U. S. 350.

The States, when they ratified the Amendment, not only were justified in relying upon the fact that under the very phraseology of the Amendment, as such terms had been used in the construction of prohibition laws by the courts, medicinal use was reserved; but could rely upon the express assurance of that fact given by the Senate Judiciary Committee in reporting the measure.

Prohibition of medicinal use is inappropriate to reasonable enforcement of prohibition as to beverage purpose. The physician, as this Court has recognized, is one whose relationships to life and health are of the most intimate character. He must possess the knowledge of diseases and their remedies, and also be safely entrusted to apply those remedies. It is thus the province of the States to require safeguards upon his character, his training, his knowledge—all for the purpose of securing to the patient an honest exercise of trained and intelligent judgment in the application of remedy to disease. *Hawker* v. *New York,* 170 U. S. 189; *Dent* v. *West Virginia,* 129 U. S. 114; Tiedeman, Control of Persons & Property, § 85, p. 239; Freund, Police Power, § 650.

The Act recognizes that the physician of trained judgment may properly determine that the prescription of alcoholic liquor is necessary to the treatment of a patient suffering from some known ailment, and that medicinal use is not a beverage purpose; Tit. II, §§ 6, 7, 8. This recognition on the part of Congress, that in the honest trained judgment of a physician the prescription of alcoholic liquor, according to fair medical standards, may be necessary to the cure of a patient, emphasizes the unreasonableness and arbitrary character of the rigid prohibition of more than one pint in ten days, regardless of the judgment of the physician and regardless of the need of the patient. The limitation eliminates any adequate prescription of liquor as a remedy in diseases running a course requiring it. Congress, after having recognized that some amount may be necessary, without looking into the question as to what amount will be required in the treatment of various diseases, rigidly fixes upon a useless, unreasonable, and arbitrary maximum amount and prohibits all else.

The question as to reasonableness has been peculiarly centered upon these particular spirituous liquor provisions

of the Volstead Act and of the supplemental Willis-Campbell Act. *Everard's Breweries* v. *Day,* 265 U. S. 545, following *United States* v. *Doremus,* 249 U. S. 86, decided that Congress, had found, upon testimony, that the medicinal value of malt liquors is not such as to require that their prescription be permitted, in view of access to vinous and spirituous liquors. The outstanding feature of the legislation in its present aspect is that it proceeds upon no investigation in regard to the facts, that it recognizes the necessity but prohibits the remedy, and that it has no relationship, in appropriateness, to the enforcement features of the powers delegated. The only constitutional guarantee of the citizen in such a situation is that this Court will insist upon the doctrine of appropriateness which has here been incorporated into the fundamental law by the very terms of the Amendment. Unless this is insisted upon, under guise of enforcement features, distinctions between powers of Congress and powers of the States are lost, and matters never intended to be delegated by the States to Congress are, nevertheless in violation of the terms of the grant, appropriated. *Lochner* v. *New York,* 198 U. S. 45; Freund, Police Power, § 223, p. 210. This Court has on closely analogous facts arrived at the conclusion of unreasonableness of such legislative provisions, and that the resultant control of medical practice in the States is inappropriate and unnecessary to reasonable enforcement. *Linder* v. *United States,* 268 U. S. 5. See also *United States* v. *Daugherty,* 269 U. S. 360; *United States* v. *Doremus,* 249 U. S. 86; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *Adams* v. *Tanner,* 244 U. S. 590; *Childrens Hospital* v. *Adkins,* 284 Fed. 613.

United States v. *Freund,* 290 Fed. 411, held that it was an extravagant and unreasonable attempt to subordinate the judgment of the trained physician to that of Congress in respect of matters with which the former

alone is competent to deal; that it infringes upon the duty of the physician to prescribe in accordance with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice.

The limitations enumerated in the terms of the Eighteenth Amendment preclude any argument that there was an intention that the police power of the States, in regard to the regulation of medicine, be interfered with. *Barbier* v. *Connelly,* 113 U. S. 27; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Bailey* v. *Drexel,* 259 U. S. 20.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. Mahlon D. Kiefer,* Attorney in the Department of Justice, were on the brief, for appellees.

Restrictions on prescribing whiskey and wine are "appropriate" legislation to enforce the Eighteenth Amendment.

In legislating for the entire nation Congress adopted a much more liberal policy with reference to the prescription of intoxicating liquors for medicinal purposes than obtained in a majority of the States which had adopted prohibition prior to the ratification of the Eighteenth Amendment. When the Supplemental Act of 1921 was passed, approximately forty States had restricted the prescription of beverage intoxicants in some form, and in more than thirty the restriction was either the same as, or more rigid than, that provided in the federal law. In eleven States no intoxicating liquor of any kind could be prescribed. In Colorado the limitation was four ounces, and in Michigan eight ounces. In eleven other States pure alcohol only could be prescribed.

There is no right to practice medicine which is not subordinate to the police power. Congress recognized State experience and in the exercise of its police power followed

the lead of the States. Where there is conflict over the form in which a physician wishes to administer alcohol, the physician must yield to such requirements as "the lawful authority deems necessary." *Gray* v. *Connecticut*, 159 U. S. 74; *Dent* v. *West Virginia*, 129 U. S. 114; *Watson* v. *Maryland*, 218 U. S. 173; *Reetz* v. *Michigan*, 188 U. S. 505; *O'Neil* v. *State*, 115 Tenn. 427; *State* v. *Davis*, 194 Mo. 485; *State* v. *Rosenkrans*, 30 R. I. 374; *State* v. *Edmunds*, 127 Iowa 333.

Legislative Acts are presumed constitutional. *Interstate Ry. Co.* v. *Massachusetts*, 207 U. S. 79; *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146. *Everard's Breweries* v. *Day*, 265 U. S. 545. See *Price* v. *Russell*, 296 Fed. 263.

Mr. William C. Woodward filed a brief as *amicus curiae* by special leave of Court, on behalf of the American Medical Association.

Messrs. Wayne B. Wheeler and *Edward B. Dunford* filed a brief as *amici curiae* by special leave of Court.

Mr. Justice Brandeis delivered the opinion of the Court.

The National Prohibition Act, October 28, 1919, c. 85, Title II, § 7, 41 Stat. 305, 311, provides: "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. . . . Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once." The supplemental Act of November 23, 1921, c. 134, § 2, 42 Stat. 222, has a related but broader restriction to which reference will be made later on. Violation of the provision subjects the offender to fine or imprisonment or both. The limitation as to amount applies only to alcoholic liquor "fit for use for beverage purposes." National Prohibition Act, Title II, § 1. "Medicinal preparations manufactured in accordance with formulas

prescribed by the United States Pharmacopoeia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes," and "patented, patent, and proprietary medicines that are unfit for use for beverage purposes," are specifically exempted from the operation of the provision. § 4(*b*) and (*c*). Moreover, the limitation does not apply to prescriptions for such liquor to be administered in certain hospitals. § 6.

In November, 1922, Samuel W. Lambert of New York City, a distinguished physician, brought in the federal court for that district, this suit to enjoin Edward Yellowley, the acting Federal Prohibition Director, and other officials, "from interfering with complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes, upon the ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by said Acts, or either of them." As the basis for this relief the bill set forth Dr. Lambert's qualifications and experience as a physician; his belief that in certain cases, including some subject to his professional advice, the use of spirituous liquor internally as a medicine in an amount exceeding one pint in ten days is necessary for the proper treatment of patients in order to afford relief from human ailments; and that he does not intend to prescribe the use of liquor for beverage purposes. It alleged that to treat the diseases of his patients and to promote their physical well-being, according to the untrammelled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health, is an essential part of his constitutional rights as a physician.

In May, 1923, the case was heard upon an application for an interlocutory injunction and a motion to dismiss. The District Court issued the injunction. 291 Fed. 640.

In December, 1924, the United States Circuit Court of Appeals for the Second Circuit reversed the decree, and directed that the bill be dismissed. 4 F. (2d) 915. In the interval, this Court had decided *Hixon* v. *Oakes,* 265 U. S. 254, and *Everard's Breweries* v. *Day,* 265 U. S. 545. In the latter, Dr. Lambert's counsel was permitted to file a brief, and to present an oral argument. The appeal in the case at bar was taken under §§ 128 and 241 of the Judicial Code and was allowed before the passage of the Act of February 13, 1925, c. 229, 43 Stat. 936. The claim is that the provision assailed is unconstitutional, because it has no real or substantial relation to the appropriate enforcement of the Eighteenth Amendment; that in enacting the provision Congress exceeded the powers delegated to it by the Amendment; and that thereby complainant's fundamental rights are violated.

The Eighteenth Amendment, besides prohibiting by § 1 the manufacture, sale and transportation of intoxicating liquors for beverage purposes, confers upon Congress by § 2, in terms, the power to enforce the prohibition by appropriate legislation. That the limitation upon the amount of liquor which may be prescribed for medicinal purposes, is a provision adapted to promote the purpose of the amendment is clear. That the provision is not arbitrary appears from the evidence considered by Congress [1] which embodies, among other things, the lessons of half a century of experience in the several States in dealing with the liquor problem.[2] That evidence dis-

[1] See House Report No. 224, 67th Cong., 1st Sess., Ser. No. 7920; Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 5033, 15–16, 146; 61 Cong. Rec. 3456, 4035, 4036, 4038, 8749–8757.

[2] At the time of the passage of the National Prohibition Act, and/or the Willis-Campbell Act, the following state legislation concerning the prescription of alcoholic beverages for medicinal purposes was in effect. In 7 States no intoxicating liquor of any kind could be prescribed. Ariz. Const. Art. 23, *Cooper* v. *State,* 19 Ariz. 486; 1915

closed that practicing physicians differ about the value of malt, vinous and spirituous liquors for medicinal purposes, but that the preponderating opinion is against their use for such purposes; and that among those who prescribe them there are some who are disposed to give prescriptions where the real purpose is to divert the liquor to beverage uses. Indeed, the American Medical Associa-

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Ida. Laws, c. 11, 1921 Ida. Laws, c. 50; 1917 Kan. Laws, c. 215, *State* v. *Miller*, 92 Kan. 994, 1000; 1916 Me. Rev. Stat. c. 20, § 17; 1915 N. C. Laws, c. 97, § 8; 1917 Utah Laws, c. 2, § 30; 1917 Wash. Laws, c. 19, § 2. In 3 States prescriptions could be made only if the liquor was made unfit for beverage purposes. 1919 Ga. Laws, No. 139, § 4(b); 1917 Neb. Laws, c. 187, § 25; 1921 N. Dak. Laws, c. 97, § 2. In 15 States only alcohol could be prescribed for medicinal purposes. 1919 Ala. Acts, No. 7, §§ 5, 7; 1919 Ark. Laws, c. 87, § 17; 1919 Del. Laws, c. 291, §§ 8, 14; 1918 Fla. Laws, c. 7736: § 5, amended by 1919 Fla. Laws, c. 7890, § 1; 1917 Ind. Acts, c. 4, § 13; 1908 Miss. Laws, c. 113; N. Mex. Const. Art. 23, 1919 N. Mex. Laws, c. 151; 1919 Nev. Stats., c. 1, § 4; 1910–1911 Okla. Laws, c. 70; § 1; 1915 Ore. Laws, c. 141, § 6(g), as amended by 1917 Ore. Laws, c. 40, § 2; 1921 S. C. Crim. Code, §§ 797, 798; 1919 S. Dak. Rev. Code, § 10273, as amended by 1919 S. Dak. Laws, c. 246, § 1; 1917 Tenn. Acts, No. 68, § 6; 1919 Tex. Laws, 2d Sess., c. 78, §§ 13, 14; 1921 W. Va. Acts, c. 115, amending c. 32A, § 4, Barnes' West Va. Code. In 3 States no more than a stated quantity of intoxicating liquor fit for beverage purposes can be prescribed at one time. 1915 Colo. Laws, c. 98, § 18; 1919 Mich. Acts, No. 53, § 19, *People* v. *Urcavitch*, 210 Mich. 431; 1918 Va. Acts, c. 388, § 13. In 11 States the standards of the federal law have been specifically adopted. 1921 Cal. Stats., c. 80; 1921 Ill. Laws, pp. 681, 687, § 8; 1920 Ky. Acts, c. 81, § 23; 1919 Minn. Laws, c. 455, § 7, as amended by 1921 Minn. Laws, c. 391, § 7; 1921 Mont. Laws, Ex. Sess., c. 9, § 6; 1921 N. J. Laws, c. 150, § 44; 1921 N. Y. Laws, c. 155, § 1214; 1921 Ohio Laws, p. 194, § 1; 1921 Vt. Laws, No. 204, § 5; 1921 Wis. Laws, c. 441, § 1(9); 1921 Wyo. Laws, c. 117, § 7. In 2 States only physicians holding a federal permit may prescribe such liquors. 1921 Conn. Pub. Acts, c. 291, § 4; 1922 R. I. Acts, c. 2231, § 4. In New Hampshire no limitations are placed upon the prescribing physician, save exercise of professional skill and the employment of specific forms and the keeping of records. 1919 N. H. Laws, c. 99, § 2, amending 1917 N. H. Laws, c. 147, §§ 16, 17.

tion, at its meeting in 1917, had declared that the use of alcoholic liquor as a therapeutic agent was without "scientific basis" and "should be discouraged," and, at its meeting in June, 1921, had adopted a resolution saying "reproach has been brought upon the medical profession by some of its members who have misused the law which permits the prescription of alcohol." With this as the situation to be met, the Judiciary Committee of the House of Representatives reported with favorable recommendation the bill which became the Act of November 23, 1921, whereby the prescription of intoxicating malt liquor for medicinal purposes is entirely prohibited, and the prescription of other intoxicating liquors is subjected to the following restrictions:

"No physician shall prescribe nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall any one prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary whereupon the necessary additional blanks may be furnished him."

The Committee said, in reporting the bill (House Report No. 224, 67th Cong., 1st Sess.):

"Section 2 prohibits the use of beer as medicine and limits the alcoholic strength and the quantity of wine that may be prescribed. It also provides that no liquor shall be prescribed for use in any period of 10 days that

contains more alcohol than that heretofore allowed. Under the national prohibition act 1 pint of beverage spirits can be prescribed. With the passage of this bill both spirituous and vinous liquor may be prescribed in one prescription, but the combined content of both liquors must not exceed one-half pint of alcohol. The purpose of this provision is not to increase the alcoholic content of the liquor that may be consumed, but to give physicians a choice between spirituous and vinous liquor within certain specified limits as to quantity.

"This section also writes into the law the present regulation as to the number of prescriptions that may be issued by a physician. One hundred are allowed within a period of 90 days, but this may be exceeded in cases of extraordinary circumstances such as the prevalence of contagious or epidemic diseases. Under ordinary circumstances reputable physicians only write a small fraction of this number, and only about 22 per cent. of the doctors hold permits to prescribe liquor of any kind, although they can be obtained without any fee, simply for the asking. There are a number of States in which the State laws prohibit physicians from prescribing liquor of any kind."

And also:

"While the majority of the States prohibit wine for medicinal purposes it was not deemed best by the committee that such provision should be inserted in the prohibition act at this time. In order, however, that this privilege should not be abused, it was deemed best to specifically limit its use, the same as has been done with spirituous liquor. Unless some limit is placed upon the amount of such liquors that may be prescribed, a number of physicians who do not have the high ethical standards of the large majority will abuse the privilege. Evidence was presented to the committee of physicians who issued hundreds of prescriptions within a few days when the

total number of other prescriptions was a negligible number. In view of the fact that most of the States have more stringent provisions than the one contained in section 2, this legislation will work no hardship upon the profession."

In *Everard's Breweries* v. *Day*, 265 U. S. 545, the validity of the provision prohibiting the prescription of malt liquor was assailed as going beyond the power of Congress and impinging upon the reserved powers of the States, in that it is an interference with the regulation of health and the practice of medicine, both of which are within the domain of the state power and outside the legislative power of Congress. The suit was against the Commissioner of Internal Revenue and other federal officers, and its chief purpose was to enjoin them from enforcing the provision prohibiting the prescription of malt liquor for medicinal purposes. This Court, besides observing that the "ultimate and controlling question" in the case was whether the provision prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes is within the power given to Congress by the Eighteenth Amendment, to enforce by "appropriate legislation" its prohibition of the manufacture, sale, etc., of intoxicating liquor for beverage purposes, proceeded to consider every phase of the question, and in conclusion held that the provision was appropriate legislation for the purpose and within the power of Congress, although affecting subjects which, but for the Amendment, would be entirely within State control. The Court referred to the settled rule that where the means adopted by Congress in exerting an express power are calculated to effect its purpose, it is not admissible for the judiciary to inquire into the degree of their necessity, and then said (p. 560):

"We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth

Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious. *Crane* v. *Campbell,* 245 U. S. 304, 307. The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States. *Ruppert* v. *Caffey, supra,* p. 297. The opportunity to manufacture, sell and prescribe intoxicating malt liquors for 'medicinal purposes,' opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; aids evasion; and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment."

The Court further held that Congress must be regarded as having concluded—as it well might do in the absence of any consensus of opinion among physicians and in the presence of the absolute prohibition in many of the States—that malt liquor has no substantial medicinal qualities making its prescription necessary; and that this made it impossible to say the provision was an unreasonable and arbitrary exercise of power.

We have spoken of that case at length because the decision was by a unanimous court and if adhered to disposes of the present case. If Congress may prohibit the manufacture and sale of intoxicating malt liquor for medicinal purposes by way of enforcing the Eighteenth Amendment, it equally and to the same end may restrict the prescription of other intoxicating liquor for medicinal purposes. In point of power there is no difference; if in point of expediency there is a difference, that is a matter which Congress alone may consider. Experience has shown that opportunities for doing what the Constitution forbids are present in both instances, and that advantage not infrequently is taken of these opportunities. Congress, in deference to the belief of a fraction of the medical profession that vinous and spirituous liquors have

some medicinal value, has said that they may be prescribed in limited quantities according to stated regulations; but it also has said that they shall not be prescribed in larger quantities, nor without conforming to the regulations, because this would be attended with too much risk of the diversion of the liquor to beverage uses. Not only so, but the limitation as to quantity must be taken as embodying an implicit congressional finding that such liquors have no such medicinal value as gives rise to a need for larger or more frequent prescriptions. Such a finding, in the presence of the well-known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis. On the whole, therefore, we think it plain that the restrictions imposed are admissible measures for enforcing the prohibition ordained by the Eighteenth Amendment.

A later case applying like principles is *Selzman* v. *United States,* 268 U. S. 466. There a section of the National Prohibition Act forbidding the sale of denatured alcohol without a compliance with certain regulations was assailed as beyond the authority of Congress under the Eighteenth Amendment upon the ground that the Amendment relates only to traffic in intoxicating liquor for beverage purposes, and that, as denatured alcohol is not usable as a beverage, authority to prevent or regulate its sale is not given to Congress by the Amendment, but remains exclusively in the States. This Court held the section valid for the following reasons:

"The power of the Federal Government, granted by the Eighteenth Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor carries with it power to enact any legislative measures reasonably adapted to promote the purpose. The denaturing in order to render the making and sale of industrial alcohol compatible with the enforcement of prohibition of alcohol for beverage purposes is not always

effective. The ignorance of some, the craving and the hardihood of others, and the fraud and cupidity of still others, often tend to defeat its object. It helps the main purpose of the Amendment, therefore, to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it."

From the authority of these cases Dr. Lambert seeks to escape by pointing out that he is a physician and believes that the use of spirituous liquor as a medicinal agent is at times both advisable and necessary. He asserts that to control the medical practice in the States is beyond the power of the Federal Government. Of course his belief in the medicinal value of such liquor is not of controlling significance; it merely places him in what was shown to Congress to be the minor fraction of his profession. Besides, there is no right to practice medicine which is not subordinate to the police power of the States, *Dent* v. *West Virginia,* 129 U. S. 114; *Collins* v. *Texas,* 223 U. S. 288; *Crane* v. *Johnson,* 242 U. S. 339; *Graves* v. *Minnesota, ante,* page 425, and also to the power of Congress to make laws necessary and proper for carrying into execution the Eighteenth Amendment. When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by some or all of the incidents which attend the exercise by a State of its police power. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 156; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 300. The Eighteenth Amendment confers upon the Federal Government the power to prohibit the sale of intoxicating liquor for beverage purposes. Under it, as under the "necessary and proper" clause of Article I, § 8 of the Constitution, Congress has power to enforce prohibition "by

appropriate legislation." High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage uses. Compare *Jacobson* v. *Massachusetts*, 197 U. S. 11.

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

The general design of the federal Constitution is to give to the federal government control over national and international matters, leaving to the several states the control of local affairs. Prior to the adoption of the Eighteenth Amendment, accordingly, the direct control of the manufacture, sale and use of intoxicating liquors *for all purposes* was exclusively under the police powers of the states; and there it still remains, save insofar as it has been taken away by the words of the Amendment. These words are perfectly plain and cannot be extended beyond their import without violating the fundamental rule that the government of the United States is one of delegated powers only and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The pertinent words of the Amendment are: ". . . the manufacture, sale, or transportation of intoxicating liquors . . . *for beverage purposes* is hereby prohibited." Plainly, Congress in submitting the Amendment, and the several states in ratifying it, meant to leave the question of the prohibition of intoxicating liquors for other than beverage purposes to the determination of the states, where it had always been. The limiting words of the Amendment are not sus-

ceptible of any other meaning; and to extend them beyond the scope of that meaning really is to substitute words of another and different import.

It is important also to bear in mind that "direct control of medical practice in the States is beyond the power of the Federal Government." *Linder* v. *United States*, 268 U. S. 5, 18. Congress, therefore, cannot directly restrict the professional judgment of the physician or interfere with its free exercise in the treatment of disease. Whatever power exists in that respect belongs to the states exclusively.

The sole question which we are called upon to consider is whether the district court erred in denying the motion of the defendants to dismiss plaintiff's bill; and upon that question, of course, we are bound to accept as true all allegations of the bill which are well pleaded.

The suit was brought by a physician of distinction and, as the court below said, "of wide and unusual experience in the practice of medicine." He alleges that it is his opinion, based on experience, observation and medical study, that the use of spirituous liquors as medicine is, in certain cases, necessary in order to afford relief from known ailments; and that in the use of such liquors as medicine it is, in certain cases, including some now under his own observation and subject to his professional advice, necessary, in order to afford relief, that more than one pint of such liquor in ten days should be used internally and, in certain cases, necessary that it should be used without delay, notwithstanding that within a preceding period of less than ten days one pint of such liquor has already been used. He further alleges that in prescribing drugs and medicines the determination of the quantity involves a consideration of the physical condition of the patient and their probable effect in each specific case.

In addition to these allegations, we have the fact that Congress, acting upon a report of one of its committees

581 Sutherland, McReynolds, Butler, and Stone, JJ., dissenting.

made after exhaustive hearings, declared by statute that the prescription of malt liquors should be prohibited and the prescription of spirituous and vinous liquors should be permitted. Justifying such legislation, the committee had reported that the overwhelming evidence was to the effect that *malt* liquors [*not also spirituous and vinous liquors*] had no substantial medicinal value. It is now said by the majority, at one point, that the preponderating opinion of practicing physicians is against the use of all three and, at another point, that only a minor fraction hold the other view. I am quite unable to assent to these generalizations. On the contrary, the impossibility of determining, from anything now before this court, what is the preponderating opinion upon the subject, is very clear. An examination of the hearings before the House Judiciary Committee, cited as authority for the foregoing statements, shows that the inquiry there was directed to the question of the medical value of *malt liquors* and that the question of the medical value of the other liquors was not under consideration. The hearings contain a few casual references to the other liquors; but I feel justified in saying that they reflect no light upon the state of medical opinion as to the value of such liquors as medicines. It is stated in the brief for the appellees that a questionnaire, sent out to one-third of the physicians of the United States, brought a reply from enough to make 21.5 per cent. of the whole number of physicians in the country, and that a little more than one-half of those replying voted "Yes" on the use of whiskey as a therapeutic agency, some of them, however, taking exception to the word "necessary," saying that no drugs were absolutely necessary. The American Medical Association, whose resolution of 1917 is referred to, have filed in this case a brief as *amicus curiae,* challenging the conclusion which is drawn from that resolution and vigor-

ously attacking the Act now under review as arbitrary and unreasonable. In 1924 the House of Delegates of the Association adopted a resolution expressing its disapproval of those portions of the Act "which interfere with the proper relation between the physician and his patient in prescribing alcohol medicinally." It seems plain, therefore, that the most that can be said is that the question is of a highly controversial character; and, since it reasonably cannot be doubted that it is a fairly debatable one, the legislative finding, necessarily implicit in the Act, that vinous and spirituous liquors are of medicinal value, must be accepted here. *Radice* v. *New York*, 264 U. S. 292, 294; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357; *Price* v. *Illinois*, 238 U. S. 446, 452.

The majority opinion rests chiefly upon *Everard's Breweries* v. *Day*, 265 U. S. 545, which, it is said, was decided by a unanimous court and, if adhered to, disposes of the present case. While, of course, in the light of the present ruling, I cannot say that, if the court had entertained that view of the scope of its decision at the time of its rendition, it would not have been rendered; I do say it is very certain that it would not have been by a unanimous court. In the opinion in that case there is some general discussion of the power of Congress in respect of the adoption of appropriate means to enforce the Eighteenth Amendment, but the decision rests upon the ground that Congress, upon conflicting evidence, had determined that *malt* liquors possessed no substantial medicinal value and judicial inquiry upon that question was, therefore, foreclosed. In direct response to the contention that the Act was an "arbitrary and unreasonable prohibition of the use of valuable medicinal agents," it was said (pp. 561–562):

"When the bill was pending in Congress the Judiciary Committee of the House of Representatives held an extended public hearing, in which it received testimony,

among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal properties. Hearings before House Judiciary Committee on H. R. 5033, Serial 2, May 12, 13, 16, 17, 20, 1921. On the information thus received the Committee recommended the passage of the bill. H. R., 67th Cong., 1st sess., Rep. No. 224. And in the light of all the testimony Congress determined, in effect, that intoxicating malt liquors possessed no substantial and essential medicinal properties which made it necessary that their use for medicinal purposes should be permitted, and that, as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act."

And finally (p. 563):

"We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes. See *Radice* v. *New York*, 264 U. S. 292."

And so here, the legislative finding, implicit in the statute now under review, to the contrary effect, in respect of *spirituous* and *vinous* liquors, likewise should be accepted as controlling, and the *Everard's Breweries* case rejected as inapplicable.

As the record now stands, therefore, we must begin this inquiry with the assumption that vinous and spirituous liquors are in fact valuable medicines; and it necessarily follows that, at least as an end as distinguished from a means to an end, the prescription of such liquors in good faith for medicinal use cannot be prohibited *by Congress*, since that body lawfully cannot legislate beyond the grants of the Constitution. The report of the committee

and the hearings will be searched in vain to find any suggestion that the quantity designated by the statute is adequate or that the committee or Congress gave any consideration to that question. The only fact in this record bearing upon that subject is the allegation, under oath, of appellant that in his professional opinion, based on experience, observation and medical study, more than that quantity, in certain cases, including some under his own observation and advice, is necessary. And, certainly, there is no basis for asserting the contrary in any fact or circumstance to be found outside the record of which this Court can take judicial notice.

The naked question, then, simply comes to this: Conceding these liquors to be valuable medicines, has Congress power, under the constitutional provision prohibiting traffic in intoxicating liquors for beverage purposes, to limit their prescription in good faith, and consequently their necessary use, for medicinal purposes, to a quantity which, under the allegations taken as true, is inadequate for such purposes? To me the answer seems plain. If Congress cannot altogether prohibit the prescription for medicinal use, it cannot limit the prescription to an inadequate quantity, for, obviously, in that case, *to the extent of the inadequacy,* the prohibition is as complete, and the usurpation of power as clear, as though the prohibition were unqualified. If the power exists to limit the quantity to a pint in ten days, it exists to limit the quantity to a tablespoonful or a teaspoonful or a few drops during the same or any other arbitrary period of time, with the result in substance and effect that the definite limitation of the prohibitory power by the words " for beverage purposes " vanishes altogether.

It is said that high medical authority is in conflict as to the medicinal value of spirituous and vinous liquors and [hence] it would be strange if Congress lacked power to determine that the necessities of the liquor problem re-

quire a reasonable limitation of the permissible prescriptions. This observation does more than beg the question,—it indulges an assumption the exact contrary of that which the record conclusively establishes, for the limitation of quantity is not only unsupported by any legislative finding that it is reasonable, but it is in flat opposition to the only facts appearing in the record which bear upon the question of what is a permissible prescription, and, therefore, is without rational basis, resting alone upon the arbitrarily exercised will of Congress. I do not see how it can be held otherwise without completely ignoring the case as made and constructing and considering another and different case.

Nor is the opinion of the majority aided by the long list of state enactments cited to demonstrate that the present statute is not arbitrary, for, since the control of the medical practice is outside the province of the federal government and wholly within that of the states, *Linder* v. *United States, supra,* the powers of Congress in that field are not to be assimilated to those of the states.

By the legislation now under review, the authority of Congress is so exercised that the reserved power of the states to control the practice of medicine is directly invaded, to the illegitimate end that the prescription and use of liquors for medicinal purposes is prohibited. It is true that Congress has wide discretion in the choice of means to carry the granted power into effect; but the means not only must be appropriate to the end but must be such as "are not prohibited, but consist with the letter and spirit of the Constitution." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. A grant of power to prohibit for specified purposes does not include the power to prohibit for other and different purposes. Congressional legislation directly prohibiting intoxicating liquor for concededly medical purposes, therefore, does not consist with the letter and spirit of the Constitution, and viewed as a

means of carrying into effect the granted power is in fraud of that instrument, and especially of the Tenth Amendment. The words of Mr. Madison (Writings of James Madison, vol. 6, p. 367) are pertinent: "Nor can it ever be granted that a power to act on a case when it actually occurs, includes a power over all the means that may *tend to prevent* the occurrence of the case. Such a latitude of construction would render unavailing every practical definition of particular and limited powers."

The effect of upholding the legislation is to deprive the states of the exclusive power, which the Eighteenth Amendment has not destroyed, of controlling medical practice and transfer it in part to Congress. See *Hammer* v. *Dagenhart,* 247 U. S. 251, 275–276. It goes further, for if Congress can prohibit the prescription of liquor for necessary medical purposes as a means of preventing the furnishing of it for beverage purposes, that body, by a parity of reasoning, may prohibit the manufacture and sale for industrial or sacramental purposes, or, indeed, as the most effective possible means of preventing the traffic in it for beverage purposes, may prohibit such manufacture and sale altogether, with the result that, under the pretense of adopting appropriate means, a carefully and definitely limited power will have been expanded into a general and unlimited power. "The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution." *Hammer* v. *Dagenhart, supra,* p. 276.

I do not doubt the authority of Congress to *regulate* the disposal of intoxicating liquors for medicinal use so as to prevent evasions of the law against the traffic in such

liquors for beverage purposes, and to that end to surround the prescription by the physician with every appropriate safeguard against fraud and imposition; but as this record now stands it cannot *prohibit* the legitimate prescription of spirituous and vinous liquors for medicine as this statute attempts to do. "Federal power is delegated, and its prescribed limits must not be transcended even though the end seem desirable." *Linder* v. *United States, supra,* p. 22. Because this statute by fixing inadequate prescriptions prohibits to the extent of such inadequacies the legitimate prescription of spirituous and vinous liquors for medicinal purposes, it exceeds the powers of Congress, invades those exclusively reserved to the states, and is not appropriate legislation to enforce the Eighteenth Amendment. The decree below should be reversed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and MR. JUSTICE STONE concur in this opinon.

NAPIER *v.* ATLANTIC COAST LINE RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

CHICAGO & NORTHWESTERN RAILROAD COMPANY *v.* RAILROAD COMMISSION OF WISCONSIN.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* RAILROAD COMMISSION OF WISCONSIN.

ERROR TO THE SUPREME COURT OF WISCONSIN.

Nos. 87, 310, 311. Argued October 20, 21, 1926.—Decided November 29, 1926.

The Boiler Inspection Act, as amended, has so occupied the field of regulating locomotive equipment on interstate highways, that state legislation requiring cab curtains and automatic firebox doors, is

precluded and such matters are left to the regulatory power reposed by the Act in the Interstate Commerce Commission. P. 608.

2 F. (2d) 891, affirmed.

188 Wis. 232, reversed.

No. 87. APPEAL from a decree of the District Court (December 1924) enjoining the Attorney General of Georgia from enforcing a state law requiring the complaining carrier to equip the fireboxes of its locomotives with automatic doors.

Nos. 310, 311. ERROR to a judgment of the Supreme Court of Wisconsin, which affirmed judgments dismissing suits to set aside an order of the State Railroad Commission, based on statute, prescribing cab curtains.

Mr. Thomas Stevenson, with whom *Messrs. George M. Napier,* Attorney General of Georgia, and *Oscar J. Horn* were on the brief, for appellant in No. 87.

Mr. Nye F. Morehouse, with whom *Messrs. R. N. Van Doren, H. H. Field,* and *C. S. Jefferson* were on the brief, for plaintiffs in error in Nos. 310 and 311.

Mr. Robert C. Alston, with whom *Messrs. Blair Foster* and *Robert S. Parker* were on the brief, for appellee in No. 87.

Mr. Robert M. Rieser, with whom *Mr. Herman L. Ekern,* Attorney General of Wisconsin, was on the brief, for defendant in error in Nos. 310 and 311.

Messrs. Andrew B. Dougherty, Attorney General of Michigan, and *Fred L. Warner,* Assistant Attorney General, filed a brief, as *amici curiae* by special leave of Court, on behalf of the State of Michigan.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases require a determination of the scope and effect of the federal Locomotive Boiler Inspection Act.

February 17, 1911, c. 103, 36 Stat. 913, as amended March 4, 1915, c. 169, 38 Stat. 1192, and June 7, 1924, c. 355, 43 Stat. 659. The main question, which is the same in the three cases, is one of statutory construction. It is whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation. Congress obviously has power to do so. Compare *Northern Pacific R. R. Co.* v. *Washington,* 222 U. S. 370; *Pennsylvania R. R. Co.* v. *Public Service Commission,* 250 U. S. 566; *Oregon-Washington R. R. & Nav. Co.* v. *Washington,* 270 U. S. 87.

No. 87 involves a Georgia statute which prescribes an automatic door to the firebox, Act of August 13, 1924, Georgia Laws, 1924, p. 173. That case is here on direct appeal from a final decree of the federal district court, entered December 23, 1924, granting the injunction. 2 Fed. (2d) 891. Nos. 310 and 311 involve a Wisconsin statute which prescribes a cab curtain, Wisconsin Statutes, § 1806a, c. 139, Laws of 1923. These cases are here on writs of error to the Supreme Court of that State, which affirmed a judgment denying the injunction. 188 Wis. 232. In Georgia, the details of the device were prescribed by the legislature. In Wisconsin, the specifications were prescribed by an order of the state Railroad Commission. In each case, an interstate carrier sought to enjoin state officials from enforcing, in respect to locomotives used on its lines, a state law which prohibits use within the State of locomotives not equipped with the device prescribed. Some of the engines were being operated entirely within the State, some across the state line to and from adjoining States. It is conceded that the federal Safety Appliance and Boiler Inspection Acts apply to a locomotive used on a highway of interstate commerce, even if it is operated wholly within one State and is not engaged in hauling interstate freight or passengers. *Southern Ry. Co.* v.

United States, 222 U. S. 20; *Texas & Pacific Ry.* v. *Rigsby,* 241 U. S. 33.

Prior to the passage of the Boiler Inspection Act, Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce. It had required a power driving-wheel brake, automatic couplers, grabirons or handholds, drawbars, safety ash pans, and sill steps. Acts of March 2, 1893, c. 196, 27 Stat. 531; March 2, 1903, c. 976, 32 Stat. 943; May 30, 1908, c. 225, 35 Stat. 476; April 14, 1910, c. 160, 36 Stat. 298. Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment in 1911. The original Act applied only to the boiler. It is entitled: "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." The provisions of that Act were extended in 1915 to "include the entire locomotive and tender and all parts and appurtenances thereof." In 1924, § 2 of the original Act was amended to read as follows:

"That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Other sections confer upon Inspectors and the Commission power to prescribe requirements and establish rules

to secure compliance with the provisions of § 2. From time to time since the passage of the original Act, the Commission has required that locomotives used in interstate commerce be equipped with various devices.[1] But it has made no order requiring either a particular type of fire-box door or a cab curtain. Nor has Congress legislated specifically in respect to either device.

The Georgia Act provides that the "automatic door shall be so constructed and operated by steam, compressed air or electricity, as deemed best and most efficient by officers of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman of said engine by means of a push-button or other appliance located on the floor of the engine deck or floor of the tender . . . to enable the fireman while firing such engine by pressure with his feet to operate such door for firing of such engine." The automatic fire-door conserves the health of the fireman by protecting him from exposures to extremes of heat and cold while performing his duties; conserves his eyesight by reducing the amount and extent of exposure to the glare of the fire; protects the safety of the employees in the event of an explosion in the fire-box; and incidentally might affect the safety of the train, after such an explosion, in that employees, being safe, might be able to bring the train under control. The automatic fire-door would also serve to protect travellers upon highways

[1] Steam gauge (Rule 28); safety valves (Rule 34); water glass and gauge cocks (Rule 37); shutoff and drain cocks (Rule 38); shields on water and lubricator glasses (Rule 41); lamps in connection with water glasses (Rule 42); particular types of ash pans (Rule 105); "clear vision" windows in cabs (Rule 116); cylinder cocks (Rule 119); sanding apparatus (Rule 120); whistle (Rule 121); safety bars or chains (Rule 122b); chafing irons (Rule 123); headlights with designated intensity and devices (Rules 129, 131); classification lamps (Rule 130); cab lights (Rule 132); safety valve for oil supply pipe (Rule 154).

crossed by the railroad at grade. For the fireman is required to aid the engineer in keeping a lookout; and with use of the old type swinging door this is not continuously possible. The glare of the flame when the door is open practically blinds the fireman for a time.

The purpose of the cab curtain is to protect engineers and firemen from the weather during the winter season. The Act made it unlawful to use "between the fifteenth day of November and the first day of April of each year any locomotive engine not equipped with suitable and approved cab curtains. Such curtains shall be so constructed as to efficiently enclose the openings between the engine cab and the water tank or coal tender attached to such locomotive engine. The windows of the cab shall be properly and closely fitted and all openings for levers or pipes and all other openings whatsoever through which cold or drafts may bring discomfort to the occupants, shall be efficiently protected in such manner as may be required and according to plans approved by the Railroad Commission." Various types of cab curtains had been voluntarily installed by the carriers. But those installed by most of the carriers were such that snow entered the cabs in large quantities; that it saturated the clothing of engineers and firemen; and that the exposure caused great discomfort and danger of serious illness. The State Commission found that the plans for cab curtains submitted by the several carriers were, with one exception, not "fully suitable and effective for the protection of the health, comfort and welfare of the engine men"; and ordered particular requirements.

Each device was prescribed by the State primarily to promote the health and comfort of engineers and firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the Commerce Clause. It may be assumed, also, that there is no physical conflict between the devices required

by the State and those specifically prescribed by Congress or the Interstate Commerce Commission;[2] and that the interference with commerce resulting from the state legislation would be incidental only. The intention of Congress to exclude States from exerting their police power must be clearly manifested, *Reid* v. *Colorado*, 187 U. S. 137, 148; *Savage* v. *Jones*, 225 U. S. 501, 533. Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act; since its provisions were limited to the boiler. *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.

The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic firedoor and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. It is argued that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521; and that Congress has definitely reserved that power to itself, *Interstate Commerce Commission* v. *Cin-*

[2] It is contended by the carriers that the order of the Wisconsin Commission is, in some minor respects, inconsistent with requirements prescribed, in other connections, by the Interstate Commerce Commission. For reasons to be stated, we have no occasion to examine into the alleged conflict.

cinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479; *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208. The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in *Vandalia R. R. Co.* v. *Public Service Commission*, 242 U. S. 255. We think that power was conferred. The duty of the Commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not "in proper condition" for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.

The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true,

is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. Compare *Louisville & Nashville R. Co.* v. *State,* 16 Ala. App. 199; *Whish* v. *Public Service Commission,* 205 App. Div. 756; 240 N. Y. 677; *Staten Island Rapid Transit Co.* v. *Public Service Commission,* 16 Fed. (2d) 313.

If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample. Obviously, the rules to be prescribed for this purpose need not be uniform throughout the United States; or at all seasons; or for all classes of service.

In No. 87, decree affirmed.

In Nos. 310 and 311, judgment reversed.

DUFFY, FORMER COLLECTOR, *v.* MUTUAL BENEFIT LIFE INSURANCE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 108. Argued October 21, 22, 1926.—Decided November 29, 1926.

1. The legal reserve of a mutual life insurance company, consisting of premiums paid by the members, and earnings upon premiums invested, is "invested capital," within the war excess profits tax

provisions of the Revenue Act of 1917, which (§ 207(a),) define invested capital, in the case of a corporation or partnership, as "(1) Actual cash paid in, (2) the actual cash value of tangible property paid in other than cash, for stock or shares of such corporation or partnership . . . and (3) paid in or earned surplus and undivided profits used or employed in the business," etc. P. 617.

2. A legal reserve so constituted, and used for the double purpose of security and investment, is not a liability, though carried as such on the books, but is assets of the company. P. 618.
3. Until the maturity of a policy, the policy holder is simply a member of the corporation, with a relation to it analogous to that of a stockholder to a joint stock company: upon the maturity of the policy he becomes a creditor with an enforceable right. P. 618.
4. Assuming that in § 207(a), *supra*, the words "actual cash paid in" are qualified by the clause "for stock or shares in such corporation or partnership," the premiums paid by the policy holders of a mutual life insurance company, are cash paid for "shares" in the corporation. P. 619.

3 F. (2d) 1020, affirmed.

CERTIORARI (268 U. S. 686) to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court (295 Fed. 881) against Duffy, Collector of Internal Revenue, in an action by the Insurance Company to recover the amount of an additional income tax assessment, which had been paid by the Company under protest.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Newton K. Fox,* Attorney in the Bureau of Internal Revenue, were on the brief, for the petitioner.

Mr. Charles E. Hughes, with whom *Messrs. John O. H. Pitney, John R. Hardin, Shelton Pitney,* and *John F. Caskey* were on the brief, for the respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case arises under the Revenue Act of 1917, c. 63, 40 Stat. 300, 302–306, imposing upon every corporation,

partnership and individual a war excess profits tax. The pertinent provisions of the Act are as follows:

"Sec. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year; . . .

"Sec. 203. That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

"(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000; . . .

"Sec. 207. That as used in this title, the term 'invested capital' for any year means the average invested capital for the year, as defined and limited in this title, averaged monthly.

"As used in this title 'invested capital' does not include stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to the tax imposed by this title, nor money or other property borrowed, and means, subject to the above limitations:

"(a) In the case of a corporation or partnership: (1) Actual cash paid in, (2) the actual cash value of tangible

property paid in other than cash, for stock or shares in such corporation or partnership, at the time of such payment (but in case such tangible property was paid in prior to January first, nineteen hundred and fourteen, the actual cash value of such property as of January first, nineteen hundred and fourteen, but in no case to exceed the par value of the original stock or shares specifically issued therefor), and (3) paid in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year: . . ."

By § 200 it is provided that the term " corporation " includes joint-stock companies or associations and insurance companies, and we assume that this includes non-stock mutual insurance companies as well as those having capital stock.

Respondent is a mutual company having no capital stock; and its policyholders constitute its members. Its business has always been conducted upon the "level premium plan," under which the estimated annual cost of the insurance is averaged and the maximum annual contribution of each member is uniform throughout the life of the policy. The annual contributions during the early years of the policy are in excess of the natural premiums, and such excess premiums, augmented by interest thereon, are held as a reserve to maintain the insurance in the later years. These contributions (or premiums), together with the increment derived from their investment, constitute the sole assets of the company. A more complete statement of the plan will be found in the opinion of the district court in this case, 295 Fed. 881, and cases cited in that opinion at p. 883.

The company is required by state laws, as a condition of continuing business, to maintain its assets at a sum not less than the amount of the " legal reserve " required by such laws. For the year 1917 the legal reserve amounted

to something over $186,000,000. In addition to the legal reserve, the company maintained a second or "contingent reserve" as a margin of safety to meet contingencies. The two reserves are not segregated in any way or separately identified or invested. The funds therein, constituting the company's entire assets, are invested in its office building and in government bonds and other securities. The income resulting from the investments is returned for federal taxation and is taxed. For the year 1917 the sum of the two reserves was returned by the company as invested capital for that taxable year. The net income shown for the year was $1,808,339.33, upon which the company paid an income tax of $108,500.36, but no excess profits tax. The Commissioner of Internal Revenue amended the returns and, thereupon, levied an additional assessment against the company amounting to $83,779.70. This was accomplished, so far as necessary to be now considered, by deducting from the amount of invested capital as returned the sum of $186,258,796, being the exact amount of the legal reserve, and reducing the company's invested capital for the year to the sum of $14,719,043.76. It is agreed that if, instead of this latter sum, the company's invested capital had been computed at any sum in excess of $25,500,000, no war excess profits tax would have been due.

The company paid the amount of the additional assessment under protest and brought this action to recover it. The collector moved to strike out the complaint as insufficient in law. It was stipulated that the decision on the motion should be a final disposition of the controversy. The district court denied the motion and rendered judgment for the full amount, with interest. 295 Fed. 881. This judgment was affirmed by the circuit court of appeals. 3 F. (2d) 1020.

The question for determination is whether the funds constituting the legal reserve, or sufficient thereof to make

up as much as $25,500,000 when added to the amount allowed by the commissioner, is invested capital within the meaning of § 207 (a) of the Revenue Act. The contention of the collector is that under subdivisions (1) and (2), § 207 (a), invested capital must be either cash or tangible property paid in for stock or shares of the corporation, and inasmuch as the company has no capital represented by stock or shares, its legal reserve is not invested capital within the meaning of those subdivisions; that the legal reserve is not surplus or undivided profits within the meaning of subdivision (3), because it is no more than the equivalent of the obligations of the company at the time under its policies of insurance. It is contended that the legal reserve represents a present existing liability; and stress is put upon the fact that it is carried by the company on the liability side of its ledger.

It appears from the complaint that the company has been in business since the year 1845. During that time the amount of its assets has increased, year by year, from about $20,000 in 1846 to over $200,000,000 in 1917, divided between the legal reserve and the contingent reserve, as already stated. The legal reserve includes $70,000,000 premiums theretofore paid and $116,000,000 earnings upon investments. The legal reserve, therefore, constitutes assets of a very permanent character. Originally consisting of the contributions of members only, the earnings now make up considerably more than one-half of the whole. The contributions were made for, and have been used to serve, the double purpose of protection and of investment. These assets, thus constituted, have never represented indebtedness any more than the capital of a stock corporation subscribed by its stockholders represents indebtedness. Until the maturity of a policy, the policyholder is simply a member of the corporation, with no present enforceable right against the assets. Upon the

maturity of the policy he becomes a creditor with an enforceable right. Then for the first time there is an indebtedness. See *Mayer* v. *Attorney General,* 32 N. J. Eq. 815, 820–822. In the meantime, each member bears a relation to the mutual company analogous to that which a stockholder bears to the joint-stock company in which he holds stock. In either case, the title to the assets is in the corporation and not in the members or stockholders.

True, the amount of the reserve is carried on the books as a liability, but only as the capital stock of a stock corporation is carried on its books as a liability. In both instances, it is a form of bookkeeping to balance assets, which in the one case are contributed by the members, and in the other by the stockholders. If § 207 (a) subdivisions (1) and (2) had defined invested capital as "actual cash paid in," without more, it probably would not be doubted that the part of the legal reserve derived from premiums would be included. The doubt results from the use of the additional words "for stock or shares in such corporation or partnership." The collector says these words qualify the phrase "(1) actual cash paid in" as well as the phrase which they immediately follow, "(2) the actual cash value of tangible property paid in." For present purposes we shall assume this to be so—although there is a plausible argument on the other side to the contrary—and consider the case accordingly. The mutual company is not a stock company, and the word "stock" may be put aside as having no application to it. It is clear that since the word "stock" does not describe interests in partnerships, included expressly along with corporations in the same paragraph, the word "shares" must be held to do so. And if that word is broad enough to include partnership interests, it is broad enough to include the interests held by members in non-stock corporations.

To hold the contrary would be to so limit the application of subdivisions (1) and (2) of § 207 (a) as altogether to exclude therefrom those corporations which have no capital stock. We cannot suppose that Congress intended such a result; but must conclude that it used the word "stock" as appropriate in the case of stock corporations and the word "shares" as appropriate in the case of partnerships and non-stock corporations. Such an interpretation does no violence to the ordinary meaning of the word, for while it is entirely proper to speak of "stock" as "shares" it is equally proper to designate the several interests in a common fund as "shares." To the extent of $70,000,000 the legal reserve consisted of "actual cash paid in" by the members. These payments were intended for investment, and were invested, to increase the resources of the company and thereby reduce the cost of the insurance; and it requires no stretch of the realities to say that, within the meaning of subdivisions (1) and (2), § 207 (a), the fund which they created is invested capital. This is enough to relieve the company from the payment of any war excess profits tax, and it is unnecessary to inquire whether the remaining $116,000,000 is to be regarded as earned surplus under subdivision (3).

Judgment affirmed.

FASULO *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 251. Argued October 13, 14, 1926.—Decided November 29, 1926.

A scheme for obtaining money, by means of intimidation through threats of murder and bodily harm, is not a "scheme to defraud," within the meaning of Crim. Code § 215, (Rev. Stats. § 5480,) punishing the use of the mails for the purpose of executing any "scheme or artifice to defraud," etc. P. 625.

7 F. (2d) 961, reversed.

CERTIORARI (269 U. S. 551) to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court sentencing Fasulo and others upon their conviction of a conspiracy to violate § 215 of the Criminal Code.

Mr. John O'Gara, with whom *Mr. Benjamin L. McKinley* was on the brief, for petitioner.

Naponiello v. *United States,* 291 Fed. 1008, should be followed rather than *Horman* v. *United States,* 116 Fed. 350; because by § 215 of the Criminal Code the statute has been vitally changed since the decision in the *Horman* case, by adding the words, "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises."

The genesis of § 215 of the Criminal Code and of § 5480 of the Rev. Stats., shows that they were intended to cover schemes to obtain money or other property by deception merely, and not to cover schemes to extort by threats of violence, real or pretended. See and cf. Act of June 8, 1872, c. 35, 17 Stat. 283, §§ 149, 300, 301; 17 Stat. c. 335, p. 283, which became §§ 3894, 4041, and 5480, Rev. Stats. The Act of June 8, 1872, was in large part an adoption by Congress of the work of a Commission appointed "to revise, simplify and consolidate the laws of the United States." Act of June 27, 1866, c. 140, 14 Stat. 74. The Commission published in 1869 a so-called Postal Code. The Postmaster General appointed a committee of post office officials "to examine and report" upon said Postal Code. On March 30, 1870, this committee submitted their report, of which a copy is now on file in the Congressional Library.

No statute has been found which punished a real threat and at the same time excused a pretended threat; but on the other hand, no statute has been found which made it criminal to make a pretended threat and treated a real threat as constituting no offense. It is certain that Con-

gress did not mean to punish real threats in enacting §§ 149, 300, and 301 of the Act of June 8, 1872; it is inconceivable that Congress meant by them to punish pretended threats. Congress evidently meant to punish wrongs in which deception was of the very essence, not wrongs such as pretended threats in which deception was an unimportant and insignificant circumstance merely. It would seem that this construction of the law agrees exactly with the interpretation given to § 5480 in *Durland* v. *United States,* 161 U. S. 306. It was evidently for the purpose of avoiding misconstruction and of restoring the law actually, but also apparently, to its original condition as intended by the Act of June 8, 1872, that the revising Commission, in drafting § 215 of the Criminal Code, inserted after the words " scheme or artifice to defraud," the very words (adding only, " or property," and leaving out, " through the mails "), which occur in § 300 of the Act of June 8, 1872, namely, " for obtaining money or property by means of false or fraudulent pretenses, representations or promises."

Extortion of the species and character here involved is essentially and characteristically a crime of violence, and is put by law writers in the same category as highway robbery. The will of the victim in both offenses is coerced, by violence, or by threats which are in reality a form of violence. Fraud, on the other hand, is essentially and characteristically the crime of craft. It is by nature sly, underhand and violence-shunning. The decisions and the treatises of law writers are replete with expressions which recognize and imply that fraud is the very opposite of violence; as for example: " The property was obtained by fraud, not by force." " Consent was obtained by fraud, not by violence." One can take up almost any text took on contracts or on wills and find that duress and fraud are differentiated. *Hammerschmidt* v. *United States,* 265 U. S. 182.

The offences are as essentially different as a battery is from a libelous article. Battery, and libel, and embezzlement and theft injure, but in different ways, and are different crimes. Viewing extortion and fraud from the essential difference as to consent, they differ more essentially than theft and embezzlement. In extortion the victim gives no real consent to parting with his property; his consent is like that of the victim who turns over his watch to the highwayman at the point of a pistol. In fraud, to the very contrary, the victim genuinely and freely consents to part with his property.

The mails have been used to further schemes to murder and to commit a multitude of other local crimes. If such instances of misuse of the mails have not moved Congress to intrude in state affairs and to legislate against those offenses, why should it be supposed or presumed that Congress has been aroused and has legislated as to offenses of the fraud of circumvention which use the mails less and are every bit as much local crimes?

It is quite another matter respecting schemes which almost necessarily employ the public agency of the mails to reach and victimize the credulous and unsuspecting, beyond the confines of the State of the culprits. The States are unable adequately to cope with them. *United States* v. *Clark,* 121 Fed. 190.

Contemporary construction shows most satisfactorily what was the mischief in the mind of Congress when it enacted these sections. *United States* v. *Owens,* 17 Fed. 72; *United States* v. *Mitchell,* 36 Fed. 492; *United States* v. *Fay,* 83 Fed. 839; *United States* v. *Wallen,* 29 Fed. 72. Cf. *Harrison* v. *United States,* 200 Fed. 662.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Mr. William D. Whitney,* Special Assistant to the Attorney General, were on the brief, for the United States.

The use of the mails for the purpose of securing money by means of threats constitutes an offense indictable under § 215 of the Criminal Code. The statute was intended, and has been properly construed by the courts, to cover the evil of obtaining money or property of another by dishonest means. *Weeber* v. *United States,* 62 Fed. 740; *Horman* v. *United States,* 116 Fed. 350. Petitioner suggests that the *Horman* case is not in point because of the addition to Rev. Stats. § 5480, made in 1909. The answer appears to be that this Court has since expressly recognized the authority of the *Horman* case. *Hammerschmidt* v. *United States,* 265 U. S. 182. This makes clear the opinion of the Court, in accord with the case of *Durland* v. *United States,* 161 U. S. 306, that the word "defraud" is directed to the case of "wronging one in his property rights by dishonest methods or schemes." Obviously it does "not extend to theft by violence," but it does extend to blackmail. The method of deprivation in the one case is physical coercion, in the other mental coercion based on the use of the mails.

It has been more than once recognized that the word "defraud" in a federal statute carries a broader meaning than at common law. *Durland* v. *United States, supra; United States* v. *Stever,* 222 U. S. 167. Having passed the limits of the common law definition, we find that the next circle of classification embraces all dishonest methods of deprivation, "the gist of which" is the use of the mails. The case of blackmail is no doubt at "the verge," but it is not without the circle of construction justified by the intent of Congress and the common meaning of words. *Naponiello* v. *United States,* 291 Fed. 1008, is in conflict with the weight of authority.

In determining the meaning which Congress intended should be given to § 215 it is a significant fact that the phrase used in § 5480 Rev. Stats., "any scheme or artifice to defraud," was embodied in § 215 of the Criminal Code.

It is further significant that all of the above-cited cases turned upon the meaning of that phrase in § 5480. Three of the cases specifically held that the sending of letters through the mails for the purpose of securing a pecuniary advantage by means of threats fell within the meaning of the words " any scheme or artifice to defraud." It was in the light of these decisions that § 215 was adopted.

The reasoning in the *Horman* case is sounder than that in the *Naponiello* case, and has behind it more of practical common sense and judgment. Obtaining money by threats of injury is defrauding according to common understanding. It is incredible that Congress has intended all these years to prohibit the use of the mails to defraud by trick or false pretenses but to leave the mails open to use by blackmailers or extortionists. The statute was construed in 1902 by the Circuit Court of Appeals in the *Horman* case to cover a case of obtaining money by threats of injury to character or reputation. There is no distinction between that and the case of threat of injury to person or property. Certiorari was denied by this Court. For a quarter of a century that decision stood unquestioned. Congress has acquiesced in that construction of the law. Its failure to pass bills introduced to prohibit the use of the mails for " blackhand " letters has no doubt been due to the belief that the subject was covered by existing statutes as construed by the courts.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The petitioner, indicted with others in the Northern District of California, was convicted of conspiracy to violate § 215 of the Criminal Code. 35 Stat. 1088, 1130. The judgment was affirmed, 7 F. (2d) 961. And see *Lupipparu* v. *United States,* 5 F. (2d) 504.

The question for decision is whether the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm is a scheme to defraud

within the meaning of that section. Petitioner contends that sending threatening letters for that purpose involves coercion and not fraud. The government insists that in a broad sense threats constitute fraud, and that the section covers the obtaining of money or property of another by dishonest means. The words of the statute relied on follow: "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . shall, for the purpose of executing such scheme . . . place, or cause to be placed, any letter . . . in any post-office, . . . to be sent or delivered . . . " shall be punished. Questions somewhat similar have been considered in the lower courts, but the issue here presented has never been decided by this court.

In *Weeber* v. *United States,* 62 Fed. 740, the defendant was convicted under the provision here in question, then a part of § 5480, Revised Statutes. The scheme to defraud alleged was this: One Kearney pretending to have a claim against Stephens placed it in defendant's hands for collection. An action was then pending in the federal court brought by the United States against Stephens. Defendant caused to be mailed a letter, purporting to be from the United States attorney to himself, in reference to furnishing testimony tending to show Stephens liable to the government, and then caused the letter to be seen by Stephens, intending that he should be frightened into paying the false claim in order to prevent disclosures to the United States attorney. The court held the indictment good and affirmed the conviction. But, in that case, there were involved trickery and deceit as well as threat. The contention that threats to injure do not constitute a scheme to defraud does not appear to have been made; at any rate, it was not discussed in the opinion.

In *Horman* v. *United States*, 116 Fed. 350, the Circuit Court of Appeals of the Sixth Circuit affirmed a conviction under § 5480. The defendant and others, pretending to have knowledge of crimes committed by Douglass and others, threatened to make them public unless given $7,000. The purpose of the conspiracy was to obtain money by means akin to, if not technically, blackmail and extortion. The court construed the section and said the words "to defraud" were not descriptive of the character of the artifice or scheme but rather of the wrongful purpose involved in devising it. And it held that (p. 352): "If the scheme or artifice in its necessary consequence is one which is calculated to injure another, to deprive him of his property wrongfully, then it is to defraud within the meaning of the statute."

On the basis of these cases the government argues that the statute embraces all dishonest methods of deprivation the gist of which is the use of the mails.

But in *Hammerschmidt* v. *United States*, 265 U. S. 182, we held that § 37 of the Criminal Code denouncing conspiracy "to defraud the United States in any manner or for any purpose" did not condemn a conspiracy to defeat the selective draft by inducing persons to refuse to register. It is there said that the decision in *Horman* v. *United States* went to the verge; that since that decision § 5480 had been amended to make its scope clearer; and that its construction in that case could not be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law. And in the discussion of the words "to defraud" it is said that they primarily mean to cheat; that they usually signify the deprivation of something of value, by trick, deceit, chicane or overreaching, and that they do not extend to theft by violence, or to robbery or burglary.

The reference in the opinion to "means that are dishonest" and "dishonest methods or schemes" does not support the government's construction of the phrase. The contrasts there emphasized and the context indicate the contrary.

And in *Naponiello* v. *United States,* 291 Fed. 1008, the Circuit Court of Appeals of the Seventh Circuit—a few days after the decision of the *Hammerschmidt* case but without reference to it—held that the use of the mails to send a letter to extort money by threats is not to promote a scheme to defraud within § 215; and said the words there used show unmistakably that the victim's money must be taken from him by deceit.

Undoubtedly the obtaining of money by threats to injure or kill is more reprehensible than cheat, trick, or false pretenses; but that is not enough to require the court to hold that a scheme based on such threats is one to defraud within § 215. While, for the ascertainment of the true meaning and intention of the words relied on, regard is to be had to the evils that called forth the enactment, and to the rule that a strict construction of penal statutes does not require the words to be so narrowed as to exclude cases that fairly may be said to be covered by them, it is not permissible for the court to search for an intention that the words themselves do not suggest. *United States* v. *Wiltberger,* 5 Wheat. 76, 95.

If threats to kill or injure unless money is forthcoming do not constitute a scheme to defraud within the statute, there is none in this case. The only means employed by petitioner and his co-conspirators to obtain the money demanded was the coercion of fear. A comprehensive definition of "scheme or artifice to defraud" need not be undertaken. The phrase is a broad one and extends to a great variety of transactions. But broad as are the words "to defraud," they do not include threat and coercion through fear or force. The rule laid down in the *Horman*

case includes every scheme that in its necessary consequences is calculated to injure another or to deprive him of his property wrongfully. That statement goes beyond the meaning that justly may be attributed to the language used. The purpose of the conspirators was to compel action in accordance with their demand. The attempt was by intimidation and not by anything in the nature of deceit or fraud as known to the law or as generally understood. The words of the Act suggest no intention to include the obtaining of money by threats. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute. *United States* v. *Lacher,* 134 U. S. 624, 628. In *United States* v. *Chase,* 135 U. S. 255, the indictment was under § 1 of the Act of July 12, 1876, c. 186, 19 Stat. 90, declaring "every . . . book, pamphlet, picture, paper, writing, print or other publication of an indecent character" to be unmailable, and making their deposit in the mails an offense. The question was whether to send an obscene letter by mail violated that section. The court held that the letter was not a writing within the meaning of the statute. It said (p. 261): "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

The threats in question cannot fairly be held to constitute a scheme to defraud.

Judgment reversed.

MURPHY ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 443. Argued November 24, 1926.—Decided December 6, 1926.

It is declared by the National Prohibition Act, Tit. II, § 21, that any room, etc., where intoxicating liquor is manufactured, sold, or kept in violation of the statute, is a common nuisance, and maintaining it is made a misdemeanor punishable by fine or imprisonment, or both. Section 22 authorizes suits in equity by the United States, in which such nuisances shall be abated, and in which the Court may enjoin occupancy of the place, for one year, or require a bond of the owner or occupant. *Held:*

1. The purpose of the latter section is preventive; abatement of the nuisance and the injunction are not an additional penalty.

2. Hence, acquittal in a prosecution under § 21, is not a bar to proceedings under § 22. P. 631.

RESPONSE to questions certified by the Circuit Court of Appeals, upon review of a decree abating a nuisance and closing the place in which it was maintained.

Messrs. Thomas Murphy and *Vincent Murphy, pro se,* submitted.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. Norman J. Morrisson,* Attorney in the Department of Justice, were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

Thomas Murphy and Vincent Murphy were tried for maintaining a nuisance in violation of Section 21, Title II of the National Prohibition Act, (October 28, 1919, c. 85; 41 St. 305, 314,) and were acquitted. Subsequently the United States brought a suit in equity to abate the same alleged nuisance under § 22 of the same Title. At the trial the defendants proved their former acquittal and

moved that the bill be dismissed. The District Court denied the motion and entered a decree abating the nuisance and enjoining the defendants from occupying or using the premises for one year. The defendants appealed. The Circuit Court of Appeals certified to this Court the question whether the former acquittal is a bar.

By § 21 any room, house, or place where intoxicating liquor is manufactured, sold, or kept in violation of the statute is declared to be a common nuisance, and maintaining it is made a misdemeanor punishable by fine, imprisonment, or both. Then follows the section under which the defendants now are sued, authorizing a suit in equity for an injunction against the nuisance as defined. A temporary writ restraining the continuance of it until the conclusion of the trial is to be issued if it is made to appear to the satisfaction of the court or judge in vacation that such nuisance exists. It is not necessary for the court to find that the property was being unlawfully used at the time of the hearing, but on finding that the material allegations of the petition are true, the court 'shall order' that no liquor shall be manufactured, sold, or stored, &c., in the place; and upon judgment that the nuisance be abated, 'may order' that the place shall not be occupied or used for one year thereafter, but may permit it to be occupied if the owner or occupant gives a bond for not less than $500 nor more than $1,000, that intoxicating liquor will not thereafter be manufactured, sold, or kept, &c., therein, &c.

The appellants say that an additional penalty is imposed by § 22, and that after they have been acquitted of the crime they cannot be punished for it in a second proceeding. *Coffey* v. *United States*, 116 U. S. 430. But although the contention is plausible it seems to us unsound. It is true, especially if the premises are closed for

a year, that a pecuniary detriment is inflicted, but that is true of a tax, and sometimes it is hard to say how a given detriment imposed by the law shall be regarded. *Hodge* v. *Muscatine County,* 196 U. S. 276, 279, 280. *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346, 348. *The Creole,* 2 Wall. Jr. 485. The mere fact that it is imposed in consequence of a crime is not conclusive. A government may endeavor to prevent certain facts and yet provide that if they happen they shall yield as much revenue as they might have yielded if lawful. *United States* v. *One Ford Coupé Automobile, ante,* p. 321. In like manner it may provide for the abatement of a nuisance whether or not the owners of it have been guilty of a crime. The only question is what the twenty-second section is intended to accomplish. It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first. This seems to us to be shown by the whole scope of the section as well as by the unreasonableness of interpreting it as intended to accomplish a plainly unconstitutional result. The imperative words go only to the immediate stopping of what is clearly a nuisance. The permissive words allow closing for a year (a not unreasonable time to secure a stoppage of the unlawful use, *United States* v. *Boynton,* 297 Fed. 261, 267,) and show the purpose of that by providing the alternative of a bond conditioned against such uses.

If we are right as to the purpose of § 22 the decree in the present case did not impose a punishment for the crime from which the appellants were acquitted by the former judgment. That it did impose a punishment is the only ground on which the former judgment would be a bar. For although the parties to the two cases are the same, the judgment in the criminal case does not make the issues in the present one *res judicata,* as is sufficiently explained in *Stone* v. *United States,* 167 U. S. 178 and

Chantangco v. *Abaroa,* 218 U. S. 476. The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place. Our answer to the question certified agrees with the conclusion of the Supreme Court of Kansas in a carefully considered case, *State* v. *Roach,* 83 Kan. 606.

Answer: No.

UNITED STATES v. McELVAIN ET AL.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 266. Submitted October 21, 1926.—Decided December 6, 1926.

1. An indictment, under § 37 of the Criminal Code, for a conspiracy to defraud the United States in respect of its internal revenue by making a false income and profits tax return, is not subject to the statute of limitations for offenses "arising under the internal revenue laws," (Act of July 5, 1884, as amended), but to the three year limitation imposed by Rev. Stats. § 1044. P. 638.
2. A proviso was added to Rev. Stats. § 1044, by the Act of November 17, 1921, 42 Stat. 220, viz., "That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years." *Held:*

   (1) The purpose of the proviso is to carve out a special class of cases, and it must be confined, by a strict construction, to the cases clearly within its purpose. P. 639.

   (2) If the proviso relates to any conspiracies under Crim. Code § 37, it is limited to those to commit the substantive offenses which it covers. It does not apply to a conspiracy to defraud the United States in respect of internal revenue. P. 639.

Affirmed.

ERROR, under the Criminal Appeals Act, to a judgment of the District Court sustaining pleas of the statute of limitations in bar of an indictment for conspiracy

to defraud the United States in respect of its internal revenue.

Solicitor General Mitchell, Assistant Attorney General Willebrandt, and *Mr. Sewall Key,* Attorney in the Department of Justice, for the United States, submitted.

The six-year period of limitations prescribed by the Act of November 17, 1921, and not the three-year period in § 1321 of the Act of 1921, applies to the crime of conspiracy to defraud the United States in its internal revenue, in violation of § 37 of the Penal Code.

United States v. *Noveck,* 271 U. S. 201, makes it obvious that the ruling below is erroneous. That case is decisive of the point that the three-year period of limitations prescribed in § 1321 of the Revenue Act of 1921, *supra,* for "offenses arising under the internal revenue laws" can have no application to the case at bar. Other cases to the effect that a crime arises under the law by which it is defined and punished are *United States* v. *Hirsch,* 100 U. S. 33, and *United States* v. *Rabinowich,* 238 U. S. 78.

The reasoning in the *Noveck* case applies with full force here. If the Act of November 17, 1921, applies to perjury, it likewise applies to conspiracy. In the offense of conspiracy to defraud the United States of revenue, unlike perjury, under the rule of the *Noveck* case, the six-year period of the Act applies, because "defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense."

The six-year period prescribed by the Act of November 17, 1921, is not limited to offenses involving the defrauding of the United States growing out of the war.

Mr. John J. Healy for defendants in error, submitted. *Mr. John H. S. Lee* was also on the brief.

Congress did not include the crime charged in this indictment within the provisions of the amendment of

November 17, 1921, which was, by its express terms, one merely purporting to amend § 1044 Rev. Stats., theretofore existing. This section, it will be observed, from its earliest inception, had never included within its terms or purview offenses under the Revenue Act. This will appear from a glance at the various sections of the statutes of limitations governing the prosecution of the criminal cases in the federal courts. Revised Statutes, §§ 1043, 1044, 1046. When Congress, by the Act of November 17, 1921, purported to amend merely § 1044, it would seem clear that it had no intention also to amend § 1046; that is, it had no intention to change the limitation fixed by § 1046 for the prosecution of offenses under the Revenue Act, and had no intention to bring within § 1044, as amended, the prosecution of any such offenses. But this is not all. In the amendment of November 17, 1921, Congress is careful again to indicate its purpose to exclude from the scope of the amendment offenses existing under the Revenue Act.

A proviso must be construed with reference to the subject matter of the paragraph or sentence to which it is appended, unless it clearly appears from a consideration of the entire Act that the legislative body intended that it should have a broader and more independent operation. *United States* v. *Dickson,* 15 Pet. 141; *Ryan* v. *Carter,* 93 U. S. 807; *United States* v. *Bernay,* 158 Fed. 792; *Aaron* v. *United States,* 204 Fed. 943; *Wall* v. *Cox,* 101 Fed. 403; *In re Matthews,* 109 Fed. 603.

Congressional debates and committee reports are competent for the purpose of showing the history of the times or the evil which the statute was intended to remedy. *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Standard Oil Co.* v. *United States,* 221 U. S. 50; *American Twine Co.* v. *Worthington,* 141 U. S. 468; *Lapina* v. *Williams,* 232 U. S. 78; *Northern Pac. R. R. Co.* v. *Washington,* 222 U. S. 370; *Oceanic Nav. Co.* v. *Stranahan,* 214 U. S. 320.

The various Acts of limitations are *in pari materia.* However broad the language of a statute or some of its expressions may be, yet if on examination it shall appear that they were intended to be limited by other provisions of the same or other Acts on the same subject, it will not be improper to restrain them accordingly. *Church* v. *United States, supra; The Elizabeth,* 8 Fed. Cas. No. 4352; *Kohlsaat* v. *Murphy,* 96 U. S. 153; *United States* v. *Ewing,* 237 U. S. 197.

If the proviso in the amendment of § 1044 does not include within its terms frauds existing under the Revenue Act, then necessarily such proviso does not include conspiracies to commit frauds on the Government under the Revenue Act.

Statutes of limitations are to be liberally construed in favor of the accused. *Lamkin* v. *People,* 94 Ill. 501; *State* v. *Asbury,* 26 Tex. 82; *Commonwealth* v. *Haas,* 75 Pa. St. 443; *People* v. *Lord,* 12 Hun. 282; Wharton, Criminal Pleading & Practice, 9th ed., § 316, p. 215.

Conspiracies to defraud the Government under the Revenue Act are offenses under § 37 of the Criminal Code and, as such, are punishable within three years of commission, as any other conspiracies are punishable within such period if not included within the proviso of the amendment of § 1044, passed November 17, 1921. Such being our contention, it is apparent that the decision of this Court in *United States* v. *Noveck* has absolutely no bearing upon the issue here presented.

Mr. Justice Butler delivered the opinion of the Court.

October 3, 1924, defendants in error were indicted under § 37 of the Criminal Code (35 Stat. 1088, 1096) for conspiracy to defraud the United States in respect of its internal revenue. It is charged that they conspired to make a false income and profits tax return for 1920 for the Freeman Coal Mining Company, and that they caused

a false return to be prepared, sworn to and filed, and committed various other overt acts. But no act is alleged to have been done later than March 14, 1921, more than three years prior to the indictment. Each of the defendants interposed a plea that the prosecution was barred because not commenced within three years after the offense. The district court, being of opinion that the applicable period of limitation had expired, entered judgment sustaining the pleas and discharging the defendants. The case is here under the Criminal Appeals Act, c. 2564, 34 Stat. 1246. *United States* v. *Barber,* 219 U. S. 72.

The question for decision is whether the applicable period is three years fixed by § 1044, Revised Statutes, or six years specified in a proviso added by the Act of November 17, 1921, c. 124, 42 Stat. 220.

It is necessary to consider a number of statutory provisions. Section 1044 provides: "No person shall be prosecuted . . . for any offense, not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed . . ." The defendants insist that the foregoing provision applies. The government contends that the case is covered by the proviso: "*Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years." And the proviso was made applicable to offenses theretofore committed and not already barred. Section 1046 provides: "No person shall be prosecuted . . . for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime."

The Act of July 5, 1884, c. 225, 23 Stat. 122, provides: "That no person shall be prosecuted . . . for any of the

various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases. . . ."

This Act was amended by § 1321 of the Revenue Act of 1921, approved November 23, 1921, c. 136, 42 Stat. 315, which eliminated the two-year period so as to make the three-year period apply to all offenses. And it was further amended by § 1010 (a) of the Revenue Act of 1924, approved June 4, 1924, c. 234, 43 Stat. 341, which added the same proviso that was added to § 1044. This latest amendment, passed after the offense here charged, applied the six-year period to offenses thereafter committed against the internal revenue laws and covered by the proviso.

The offense charged is a conspiracy and not one arising under the internal revenue laws; and it is not within the Act of July 5, 1884, as amended. The period applicable is either three years under § 1044 or six years under the proviso. The government argues that defrauding the United States is an ingredient of the crime charged, and that the six-year period applies. It relies on *United States* v. *Noveck*, 271 U. S. 201. But that case is not like this one. The question there involved was whether an allegation in an indictment for perjury (§ 125, Criminal Code), that the crime was committed for the "purpose of defrauding the United States," took the case out of the general clause of § 1044. We held that the purpose stated was not an element of perjury as defined by statute, and that the extraneous fact alleged did not bring the case within the proviso. When the opinion is read in the light of the issue presented and decided, it furnishes no support for the government's contention here.

The proper application of the proviso is to be found upon a consideration of its scope as compared with that

of the original section having regard to the other statutes of limitation. Section 1044 is comprehensive in language and purpose; it relates to all crimes, excepting only capital offenses and those arising under the revenue laws and slave trade laws. The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose. *United States* v. *Dickson,* 15 Pet. 141, 165; *Ryan* v. *Carter,* 93 U. S. 78, 83.

The proviso relates to substantive offenses involving defrauding or attempts to defraud the United States, whether committed by one or more or by conspiracy or otherwise. It does not extend to any offenses not covered by § 1044. The crime of conspiracy to commit an offense is distinct from the offense itself. The language of the proviso cannot reasonably be read to include all conspiracies as defined by § 37. But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offenses which it covers. All the various offenses under the internal revenue laws are excepted from § 1044. The proviso relates to the preceding part of the section and can have no broader scope. *Wayman* v. *Southard,* 10 Wheat. 1, 30. And legislation contemporaneous with and subsequent to its passage shows that Congress intended that the proviso should not include such offenses. The proviso and § 1321 were considered by Congress at the same time. The latter was enacted six days after the proviso; it relates exclusively to offenses under the internal revenue laws. That section is to be applied rather than the general language of the proviso added to a statute that never covered such offenses. And § 1010 (a) which prescribes for them the same limitations as are fixed by the proviso, was unnecessary if the proviso already applied.

The three-year period fixed by § 1044 is applicable, and defendants' pleas were rightly sustained.

Judgment affirmed.

WRIGHT *v.* YNCHAUSTI AND COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 316. Argued October 28, 1926.—Decided December 13, 1926.

1. A decision of the Insular Collector of Customs, of the Philippine Islands, ordering that moneys collected and paid under protest, as customs duties, be refunded upon the ground that the property assessed was not dutiable under the tariff, is final and conclusive, unless appealed to the Court of First Instance. P. 644.
2. The Insular Auditor has no power to reëxamine the merits of such a decision by the Insular Collector, and his duty to countersign the Insular Collector's warrant for the refund, when in due form and drawn upon an applicable appropriation, is ministerial, and enforceable by mandamus. P. 651.

47 P. I. Rep. 866, affirmed.

CERTIORARI (271 U. S. 652) to a judgment of the Supreme Court of the Philippine Islands awarding an original mandamus, at the suit of Ynchausti & Company, to compel Wright, the Insular Auditor, to countersign a warrant drawn by the Insular Collector of Customs in favor of the firm, for a refund of money erroneously collected as customs duties.

Messrs. L. H. Hedrick and *O. R. McGuire* for the petitioner.

Mr. William H. Lawrence, with whom *Messrs. F. W. Clements, Lawrence H. Cake,* and *Alexander Britton* were on the brief, for the respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case was begun by a petition filed by Ynchausti and Company, January 19, 1925, in the Supreme Court of the Philippine Islands, under § 2947 of the Compiled Acts of the Philippine Commission, 1907, for an original

writ of mandamus directed to Ben F. Wright, Insular Auditor, to require him to countersign a warrant for 159,960 pesos drawn by the Insular Collector of Customs in favor of Ynchausti and Company. The Insular Auditor filed an answer, to which the petitioner demurred, on the ground that the facts stated therein were not sufficient to constitute a defense. The Supreme Court of the Philippine Islands sustained the demurrer and ordered that the writ issue as prayed. This Court granted a certiorari April 26, 1926. 271 U. S. 652.

Ynchausti and Company were the agents and operators of the steamship Venus, a vessel engaged in the coastwise trade in the Philippine Islands. They sent her to Hong Kong, a Crown colony of Great Britain, there to receive certain heavy repairs and construction work. When the vessel returned to the Philippines. the Insular Collector of Customs, who is Collector at Manila and who has subordinate collectors at other ports, assessed a customs duty of 159,960 pesos on account of the repairs. Ynchausti and Company paid the duty, but filed a protest with the Collector, on the ground that the repairs were free from duty under the law. The Collector deposited the money in the Insular Treasury. Upon a hearing of the protest and an examination of evidence, the Collector reversed his ruling, rendered a decision sustaining the protest and ordered a refund of the money paid, under a permanent appropriation for such purposes. A copy of the Collector's decision was sent to the Secretary of Finance and the Insular Auditor. The Secretary of Finance did not certify a desire to appeal from the Insular Collector's decision to the Court of First Instance within fifteen days thereafter, as authorized by law, although the Insular Auditor urged it. After the time for an appeal had expired, a warrant was drawn by the Insular Collector in favor of Ynchausti and Company for the amount of the duty paid. Upon presentation of the warrant to the Insular Auditor for his

countersignature, required by the Administrative Code of the Islands to be attached to every warrant, he withheld it.

By §§ 614, 616, 621 of the Insular Administrative Code of 1917, revenue funds are not to be withdrawn from the Insular Treasury except upon warrant. Warrants are to be drawn upon the Insular Treasury by the Chief of the Bureau or office having control of the appropriation or fund against which such warrants are chargeable, and are to be made payable to the creditor to whom the money is due. No Insular warrant is to be paid by the Treasurer until countersigned by the Auditor. By § 3920 of the Compiled Laws of the Philippines of 1907, a permanent appropriation is provided for refund of duties paid into the Treasury in excess of the final liquidation and the amount legally due.

The history of the legislation, in respect of classification for duties on repairs of Philippine vessels made in a foreign country, is as follows:

The Philippine Tariff Act of Congress of August 5, 1909, 36 Stat. 130, c. 8, § 8, provided:

"That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States, or any of its possessions except as otherwise provided in this Act, shall be as follows: . . .

"Par. 200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem.

"Provided, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded

in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

Paragraph 348 is part of § 11 of the same act, and declares that certain imports shall be free of duty upon the importation thereof into the Philippine Islands. One is described as follows:

"Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands."

This Tariff Act was amended by the Philippine Legislature under the authority of the Act of Congress of August 29, 1916, 39 Stat. 545, c. 416, usually called the Jones Act, by § 10 of which it is provided:

"That while this Act provides that the Philippine government shall have the authority to enact a tariff law the trade relations between the islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States: *Provided,* That tariff acts or acts amendatory to the tariff of the Philippine Islands shall not become law until they shall receive the approval of the President of the United States."

Acting under this authority, the Philippine Legislature passed an amendment to the Tariff Act, entitled No. 2872, which was approved by the President of the United States on November 24, 1919. That Act amended § 200, already quoted, by continuing the duty on repairs at 50 per cent. until December 31, 1924, and then reducing the rate to 25 per cent. thereafter, and changed the proviso as follows:

"*Provided,* That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and

within a reasonable time, in the judgment of said collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

The question here presented is whether the Philippine Auditor may consider and reverse the ruling of the Insular Collector in respect of the refund of the duties paid on these repairs, or whether the ruling of the Insular Collector under the circumstances is final and the necessary countersigning of the warrant drawn by the Insular Collector is merely a ministerial duty subjecting the Auditor to mandamus.

The Act of Congress of August 29, 1916, to provide a more autonomous government for the Philippines, known as the Jones Act (39 Stat. 545, c. 416, § 24), describes the present powers and duties of the Insular Auditor in part as follows:

"That there shall be appointed by the President an auditor, who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches.

"He shall keep the general accounts of the government and preserve the vouchers pertaining thereto.

"It shall be the duty of the auditor to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive or extravagant. . . .

"The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive. With

the approval of the Governor General, he shall from time to time make and promulgate general or special rules and regulations not inconsistent with law covering the method of accounting for public funds and property, and funds and property held in trust by the government or any of its branches: . . .

"The decisions of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed. The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office. . . ."

In the administration of his duty, he is authorized to summon witnesses, administer oaths and to take evidence and enforce the attendance of witnesses.

Section 25 provides:

"That any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authorities relied upon for reversing such decision.

"If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal and transmit it to the auditor and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, together with the appeal and the papers necessary to a

proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive."

The argument is that, as the subject matter here is a claim against the Insular Treasury, it is necessarily exclusively within the broad powers of the Auditor to pass on it, and that his duty to countersign the warrant for it includes this discretion, which can only be reviewed by the Governor General and the Secretary of War. There is no doubt that, from the beginning of the civil government in the Philippines, established by the President as Commander-in-Chief, in 1901, it was his intention to give to the Secretary of War the means of supervising the disbursements of the funds in the Philippine Treasury and the allowance of claims upon them through the Insular Auditor, who was to be appointed by the Secretary of War. Presidential Order, February 23, 1901, Act No. 90, Public Laws Enacted by the Philippine Commission, vol. 1, p. 160. There was substituted by the Philippine Commission for Act. No. 90, the Accounting Act, No. 1402, in 1905, *op. cit.*, vol. 5, p. 58, and the new Accounting Act, No. 1792, in 1907, *op. cit.*, vol. 6, p. 475. Then followed the Administrative Act of 1916, by the Philippine Legislature, which created a Board of Audits, with the Auditor at its head; and this was repeated in the Administrative Code of 1917, c. 26, enacted after the passage of the Jones Act. The scope of duties of the Auditor as conferred in Act No. 90 is substantially the same as in the acts which have followed it. It was said in all these acts, including the Jones Act, that the Insular Auditor should have the same authority as the several auditors of the United States and the Comptroller of the Treasury.

Parallel with this legislation, however, was the Customs Administrative Act of 1902, No. 355, Public Laws Enacted by the Philippine Commission, vol. 1, p. 788, which organized the Bureau of Customs on February 6, 1902,

very shortly before the passage by Congress of an act temporarily to provide revenue for the Philippine Islands, March 8, 1902, 32 Stat. 54, c. 140, confirming the Tariff Act passed by the Commission in September, 1901, No. 230, Public Laws Enacted by the Philippine Commission, vol. 1, p. 581. By that Act, and by all subsequent amending acts on the subject, collectors of customs were given the duty of liquidating the duties, of determining abatements for manifest clerical error, and for loss or damage of goods, and of promptly granting refunds as allowances or abatements, and those claims thus allowed by the collectors were to be certified to the Auditor of the Islands, with their recommendations and with all necessary papers and documents. This was provided evidently to permit prompt correction of clerical and other obvious errors by the collector. The Auditor was directed to audit the same and draw the warrant for the refund so forwarded in settlement therefor if found correct. The foregoing is embodied in existing law in the Administrative Act of 1917, and it may be that in such a case, by reason of the language used, the Insular Auditor is given discretion to withhold his approval of a refund thus granted by the Collector. We do not find it necessary to decide that question and only mention it in order to make clear the question before us and what we are deciding.

What we are here dealing with is, not clerical or other obvious errors in collections, but controversies over the classification of articles for duty under the Tariff Act, and the determination of the duties to be assessed upon such articles by the Collector, accompanied and contested by a filed protest of the importer. In such a case, a different system has been provided from the beginning, 1902. By §§ 286, 287, 288 and 289 of the Customs Administrative Act of 1902, provision was made for the clas-

sification of the imports and the fixing of duties by the Collector, and their collection, a protest by a tax payer who objected, an appeal on that protest to the Insular Collector, an appeal from his decision by the defeated tax payer to a court created by the Act, called a Court of Customs Appeals, which conclusively decided the question. This law also provided that if the decision of the Insular Collector was adverse to the government, the Secretary of Finance and Justice, the head of the Department, might within a certain time initiate an appeal to the Court of Customs Appeals. Thereafter the personnel of the Court of Customs Appeals was changed in Act No. 864, September 2, 1903, Public Laws Enacted by the Philippine Commission, vol. 3, p. 3, and an appeal given upon the disagreement between the Judges of the Court of Customs Appeals to the Supreme Court.

By Act No. 1405, adopted by the Commission October 13, 1905, Public Laws Vol. 5, p. 75, the Court of Customs Appeals was abolished and its duties were transferred to the Court of First Instance, with an appeal to the Supreme Court, and these changes were all embodied in the compilation of the statutes made in 1907 and have been continued since, in the Administrative Acts of 1916 and 1917. No change in the administration of the Bureau of Customs or the Bureau of Audits was made by the Philippine Tariff Act of Congress, of August 5, 1909, 36 Stat. 130, c. 8, which supplanted the Tariff Act of the Philippine Commission of 1902.

The present procedure fixed by Philippine law for raising the question of the legality of classification for duty on importations and of the collection of such duties is to be found in the Administrative Code of the Islands of 1917, already cited, made necessary by the passage of the Jones Act.

The relevant sections of the Code follow:

"Section 1383. The party aggrieved by the decision of the Insular Collector in any matter brought before him

upon protest or by his action or decision in any case of seizure may procure the cause to be removed for review into the Court of First Instance sitting in the city of Manila, in the manner and within the period hereinafter prescribed.

"Unless the proper party in interest shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him.

"Section 1384. The removal of a cause into court may be had at the instance of the protesting party, or, in case of seizure, at the instance of the owner or agent of the seized property. If the decision of the Insular Collector is adverse to the Government the cause may also be removed in the manner hereinafter specified, by order of the Department Head.

"Section 1386. Upon making any decision which may be removed upon the order of the Department Head, the Insular Collector shall immediately transmit a copy of such decision to him and also to the Insular Anditor; and if within fifteen days thereafter the Department Head shall certify that in his opinion the decision ought to be revised by the Court of First Instance in the city of Manila, it shall be the duty of the Insular Collector, upon notification thereof, to transmit the original record to said court in the same manner as upon removal by a party other than the Government."

This history shows that, since the beginning of civil government in the Philippines, the policy of the Island Government has been to take out of the jurisdiction of the Auditor contested claims for refund of duties based on protest, and involving a re-examination of the action of the local Collectors of Customs by the Insular Collector in assessing such duties. The decisions of the Insular Collector, with respect to refunds of this class, were administratively final, but appeals from his conclusions,

if duly taken, became the subject of judicial examination, at first by the Court of Customs Appeals, and afterwards by the Court of First Instance of the proper jurisdiction, and by the Supreme Court.

It is thus quite clear that the provision of the Jones Act and of acts which preceded it, for review of the decisions of administrative officers by the Insular Auditor from which appeals could be taken to the Governor General of the Islands, and thence to the Secretary of War, was not intended to include decisions upon protested classification of duties under the Tariff Act.

The unchanged policy as to such decisions is, that appeal from the Insular Collector's action should be left to the taxpayer, on the one hand, and to the head of the Finance Department, on the other, and, if taken, should be considered by the courts; and that, failing such appeal, the action of the Insular Collector should be final. It would be incongruous to provide for appeal to the courts at the instance of either the importer or the head of the department, and, in the absence of such appeal by either, to have a review by the Auditor. It would delay decision of the legality of the classification for a year. It would create two tribunals of appeals in respect of classification which might cause embarrassing and confusing conflict.

It has not been directly argued, but there has been an intimation in the argument for the petitioner, that greater weight is to be attached to the Congressional acts, including the Jones Act, in defining the duties of the Auditor, than to the provisions of the Customs Administrative Act of 1902, and of the Administrative Acts of 1916 and 1917, fixing the duties of the Insular Collector in classification of duties and appeals to the courts, which were acts only of the Philippine Commission or the Philippine Legislature without specific Congressional approval. If there were a conflict between the two, of course, the Congressional legislation must control. But conflict is not to be pre-

sumed because, first, under the Letter of the President in establishing the Philippine Commission, of date April 7, 1900, Public Acts Enacted by the Philippine Commission, vol. 1, p. lxiii; second, under the Act of Congress of July 1, 1902, 32 Stat. 691, c. 1369, confirming the prior legislative action of the Philippine Commission and vesting future legislative power in the Commission and in a subsequent legislature therein provided for, and third, under the Jones Act, 39 Stat. 545, c. 416, changing somewhat the form of the Philippine government, all general legislative power was vested in the Island legislature, with some exceptions, of which none included the administrative provisions for collecting the customs revenue. Of course all such legislation was subject to annulment by Congress, but although the legislative provisions for action by the Insular Collector of Customs and the courts in respect of classification of imports and collection of duties were established in 1902, and continue until to-day, they have never been disturbed, and have evidently never been thought by Congress to be in conflict with the powers of the Auditor.

In view of this legislative history, it is not difficult to reach a conclusion and to define what the function of the Auditor of the Islands is in such a case as this. To take money out of the Treasury on appropriation, a warrant has to be drawn by the head of the bureau having the payment of the claim in charge, and the warrant must be countersigned by the Insular Auditor before it is paid; but where the Insular Auditor is not vested with administrative discretion to pass upon the merits of the claim for which the warrant is drawn, his only function is to determine whether the warrant is drawn by the proper officer upon the decision of the proper tribunal, and is applicable to an existing appropriation; and, having been satisfied as to these preliminaries, his duty is merely ministerial. In this case, having ascertained that

the Insular Collector has rendered an opinion that was final by reason of a failure of either party to appeal to the court therefrom, it is his duty to countersign the warrant and such a duty may be controlled by mandamus. *Kendall* v. *United States,* 12 Pet. 524; *Work* v. *United States ex rel. McAlester-Edwards Coal Co.,* 262 U. S. 200; *Work* v. *United States ex rel. Mosier,* 261 U. S. 352.

We may add that such a conclusion is quite in keeping with the functions of the Auditors of the Treasury and the Comptroller of the Treasury of the United States, a comparison which is constantly used in the Philippine statutes. Neither the Auditors nor the Comptroller of the Treasury of the United States are vested with authority to decide questions of classification of duties under tariff acts. Those are considered and disposed of, first by the Collectors of Customs, then by appeal after written notice to a Board of General Appraisers, and then by a review by the Court of Customs Appeals. Act of June 10, 1890, 26 Stat. 131, 136, c. 407, § 12; Act of May 27, 1908, 35 Stat. 403, 406, c. 205, § 3; Act of August 5, 1909, 36 Stat. 11, 98, c. 6, § 28; Act of September 21, 1922, 42 Stat. 858, 970, c. 356, Title IV, § 515. Under certain limitations a further review may be had in this Court. Act of August 22, 1914, 38 Stat. 703, c. 267.

The judgment of the Philippine Supreme Court is

Affirmed.

UNITED STATES *v.* STORRS ET AL.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

No. 95. Argued November 24, 1926.—Decided December 13, 1926.

A plea to abate an indictment because of the presence of a court stenographer at the grand jury investigation and of improper participation in the proceedings by the district attorney, does not cease to be a plea in abatement and become a plea in bar, within the

meaning of the Criminal Appeals Act, from the circumstance that by the time when it was sustained the statute of limitations had intervened to prevent further prosecution. P. 654.

Writ of error dismissed.

ERROR to a judgment of the District Court sustaining a plea and abating an indictment.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Mr. William D. Whitney,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Albert R. Barnes, with whom *Messrs. Mahlon E. Wilson* and *Dan B. Shields* were on the brief, for the defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The defendants in error were indicted for conspiracy to violate and violation of § 215 of the Penal Code, punishing use of the mails for the purpose of executing a scheme to defraud. They pleaded in abatement that when the grand jurors were investigating the charge the official court stenographer was present and took down the evidence; that the district attorney was also present and undertook to give a summary of the evidence to the grand jurors, and that he advised them that any indictment, if found, must be against all the defendants named. On these grounds it was prayed that the indictment be abated and that the defendants should not be required to answer the same. The District Court overruled a demurrer, sustained the plea on the evidence and entered judgment that the indictment be abated. It is certified in the record that when the judgment was entered the statute of limitations had run and that therefore the United States will be barred from further prosecution of the defendants. The United States brings this writ of

error on the ground that in these circumstances the plea was in substance a 'special plea in bar' within the meaning of the Criminal Appeals Act of March 2, 1907; c. 2564; 34 Stat. 1246.

It is true that there is less strictness now in dealing with a plea in abatement than there was a hundred years ago. The question is less what it is called than what it is. But while the quality of an act depends upon its circumstances, the quality of the plea depends upon its contents. As was said at the argument, it cannot be that a plea filed a week earlier is what it purports to be, and in its character is, but a week later becomes a plea in bar because of the extrinsic circumstance that the statute of limitations has run. The plea looks only to abating the indictment not to barring the action. It has no greater effect in any circumstances. If another indictment cannot be brought, that is not because of the judgment on the plea, but is an independent result of a fact having no relation to the plea and working equally whether there was a previous indictment or not. The statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense. This plea is not a plea in bar and the statute does not cover the case.

The Government bases its argument upon *United States* v. *Thompson*, 251 U. S. 407. In that case an indictment was quashed by the trial Court upon motion on the ground that the same counts had been submitted to a previous grand jury and no presentment had been made, and that they could not be submitted to a second grand jury without leave of Court, which had not been obtained. It so happened that a further prosecution upon these counts would be barred by the statute of limitations, although other counts had been presented in the first case upon which a trial still might be had. This Court held that the motion to quash amounted to a plea

in bar since the facts alleged barred any later proceeding by the United States, according to the law laid down by the trial Court, except upon a condition that was held by this Court to be improperly imposed. Perhaps the decision went to the extreme point, but it was put on the contents of the plea seen in the light of the law applied, not on the fact that the statute of limitations had run. It was said that the United States had the right to present and the grand jury had the right to entertain the charges without leave of court and that the necessary effect of this judgment "was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based." 251 U. S. 912. It was added that the same was true as to the authority of the district attorney and the powers of the grand jury "since the exercise in both cases of lawful authority was barred by the application of unauthorized judicial discretion." We are of opinion that this decision interposes no obstacle to what seems to us the natural interpretation of the law.

Writ of error dismissed.

DYSART v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 102. Submitted November 23, 1926.—Decided December 13, 1926.

Letters advertising a home for the care and protection of pregnant unmarried women and their infants are not "obscene, lewd or lascivious," within § 211, Crim. Code, even when mailed, without excuse, to refined women. *Swearingen* v. *United States,* 161 U. S. 446. P. 656.

4 F. (2d) 765, reversed.

CERTIORARI (268 U. S. 687) to a judgment of the Circuit Court of Appeals affirming a conviction for mailing an obscene, lewd and lascivious card and letter.

Mr. J. W. Marrow for the petitioner, submitted.

Solicitor General Mitchell for the United States, submitted the case, without being able to support the decision below. *Assistant Attorney General Luhring* and *Mr. Harry S. Ridgely*, Attorney in the Department of Justice, were also on the brief

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Circuit Court of Appeals—4 Fed. (2d) 765—affirmed a judgment of conviction under an indictment which charged that petitioner deposited in the Post Office at El Paso, Texas, for conveyance through the mails, an obscene, lewd and lascivious printed card and letter, in violation of Section 211, Criminal Code. There were eleven counts, identical in all respects except that each named a different addressee, generally an unmarried woman.

Copies of the card and letter were set out *in haec verba*. They were intended to advertise The Queen Ann Private Home for unmarried women during pregnancy and confinement, who prefer to be away from home during such time in order "to preserve individual character or family reputation." The letter, ostensibly intended for a doctor, states: The home is a private place for the care and protection of a few unfortunate women "until the time when they may return to their homes and friends, free from the burden of their mistake, to become useful members of society." "We find homes for infants by adoption when desired, or provide board for them at reasonable rates." Only persons recommended by reputable physicians are accepted. And it invites visits by physicians.

Section 211, Criminal Code, was taken from Section 3893, Revised Statutes. The pertinent portions follow: "Every obscene, lewd or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character . . . is hereby declared to be nonmailable matter . . . Whoever shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by this section to be nonmailable . . . shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

The Solicitor General, with his usual commendable candor, after calling attention to the facts disclosed by the record and relevant opinions, adds: "It is not so easy to believe that circulars of this kind could to any substantial degree undermine morals or induce delinquency. To some such a result would seem altogether fanciful."

In *Swearingen* v. *United States,* 161 U. S. 446, 450, where the indictment charged that the plaintiff in error mailed a newspaper containing an "obscene, lewd and lascivious article," contrary to Section 3893, Revised Statutes, this court said: "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit. Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch

the mind and morals of those into whose hands it might fall."

Notwithstanding the inexcusable action of petitioner in sending these advertisements to refined women, it is not possible for us to conclude that the indictment charges an offense within the meaning of the statute as construed by the opinion just cited. The motion to quash should have been sustained by the trial court.

The judgment below must be reversed and the cause remanded to the District Court, Western District of Texas, for further proceedings in harmony with this opinion.

Reversed.

VIRGINIAN RAILWAY COMPANY *v.* UNITED STATES ET AL.

UNITED STATES ET AL. *v.* VIRGINIAN RAILWAY COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Nos. 281, 282. Argued October 29, 1926.—Decided December 13, 1926.

1. Whether a rate is unjustly discriminatory is a question on which the finding of the Interstate Commerce Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. P. 663.
2. The fact that the purpose of a carrier in making a trackage arrangement with another is to increase its own business, is not a legal excuse for unjust discrimination in through rates, resulting from the arrangement, among shippers on the carrier's line. P. 663.
3. An order of the Interstate Commerce Commission for abatement of unjust discrimination among shippers on a carrier's line, resulting from a trackage arrangement, may be directed to that carrier as well as to the other with which the arrangement exists, although the latter alone may be responsible for the rates granted the favored shippers. P. 665.

4. A finding of the Commission that a rate is unreasonable, is binding on this Court, when supported by evidence, without regard to the soundness of the Commission's reasoning and conclusions or their consistency with findings in other proceedings. P. 665.
5. Section 15(3) of the Act to Regulate Commerce does not require that the Commission make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law. P. 666.
6. The fact that an order of the Commission requiring a carrier to establish through rates from its lines over lines of two other carriers may result, through duplication of routes, in discrimination against shippers on lines of those carriers, does not make it unreasonable or otherwise illegal. P. 667.
7. The force and effect of a decree of a federal court dismissing a bill and dissolving an interlocutory injunction are not suspended as a mere consequence of an appeal to this Court, even if a *supersedeas* is allowed. P. 668.
8. Under the Act of October 22, 1913, the District Court of three judges has power to grant a stay of an order of the Interstate Commerce Commission pending appeal to this Court from a decree refusing a temporary injunction and dismissing the bill. P. 668.
9. The Act of 1913, in this respect, is *in pari materia* with § 266 of the Judicial Code, and to be similarly construed. P. 671.
10. A stay of an order of the Interstate Commerce Commission pending appeal from a decree refusing an injunction, is not a matter of right, even if irreparable injury may otherwise result to the appellant, and requires much stronger and more special reasons for its justification when the decree has dismissed the bill on the merits than where it is interlocutory. P. 672.
11. When not otherwise apparent to the parties and the appellate court, the grounds of a decision of the District Court should be indicated by an opinion—particularly in equity matters involving complicated facts. P. 675.

No. 281, affirmed.

No. 282, reversed.

Cross appeals from a decree of the District Court refusing a temporary injunction and dismissing the bill, in a suit against the United States and the Interstate Commerce Commission to enjoin an order of the latter respecting rates on coal. The appeal of the defendants was from

so much of the decree as restrained enforcement of the order pending the perfecting and determination of the primary appeal.

Mr. James W. Carmalt, with whom *Messrs. E. W. Knight* and *W. H. T. Loyall* were on the brief, for the Virginian Railway Co.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Solicitor General Mitchell* was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Ewing H. Scott filed a brief in behalf of the Gulf Coal Co. et al., interveners.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

An extensive territory in West Virginia comprising the coal mining districts known as New River, Tug River and Pocahontas is served by three railroad systems. Each grants blanket rates to destination from the mines within the district served by it. The blanket rates to each destination are the same on all the systems. Two of them, the Chesapeake & Ohio and the Norfolk & Western, have lines extending from the Atlantic Ocean to the Middle West. The line of the third, the Virginian, extends only eastward to tidewater. Some mines in the district are served directly by only one of these railroads, some by more. Ninety-nine mines are located only on the Virginian. Of these 45 enjoy, by reason of the trackage agreements to be described, the same rates to the West as do mines on the Chesapeake & Ohio and on the Norfolk & Western. The remaining 54 are denied the opportunity of reaching the western markets.

Some of the 54 made complaint to the Interstate Commerce Commission that they are denied access to the

western markets; and sought relief under both § 1 and § 3 of the Act to Regulate Commerce. For most of these 54 mines access to these markets was and is physically possible through a junction of the Virginian and the Chesapeake & Ohio. But that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive. The complainants contended before the Commission that the existing rate schedule to the West subjects them to unjust discrimination and, also, that the combination rates are unreasonable. To establish the discrimination, the shippers relied, among other things, upon the fact that 45 other mines located only on the Virginian enjoy the favorable blanket rates to the West. To establish the unreasonableness, they showed, among other things, that mines, similarly situated, located only on the Chesapeake & Ohio and on the Norfolk & Western enjoy those rates.

The Chesapeake & Ohio did not oppose granting to the 54 mines the relief sought. The Virginian resisted strenuously. The complete record of the proceedings before the Commission occupies 713 pages of the printed record in this Court, besides 67 exhibits, many of them elaborate, one covering 89 pages. The proceedings before the Commission, begun on May 15, 1922, did not close until February, 1923. The proposed report of the examiner was served on April 30, 1924, was submitted to Division 3 of the Commission on June 30, 1924, and its original report was filed on March 10, 1925. The Commission found that the existing rates from the mines in question subjected the shippers to undue prejudice and also that the rates were themselves unreasonable. *Wyoming Coal Co.* v. *Virginian Railway Co.*, 96 I. C. C. 359; 98 I. C. C.

488. It ordered the carriers "according as they participate in the transportation" to cease and desist from collecting, for the transportation of coal from certain stations on the Virginian Railway to interstate destinations in the West, rates which exceed those to be prescribed pursuant to the order; and then directed the carriers to establish "rates which shall not exceed the district rates maintained on like traffic" by those carriers respondents to the same destinations "from mines in the New River districts of the Chesapeake & Ohio Railway Company, and the Virginian Railway Company, respectively, and the Pocahontas and Tug River districts of the Norfolk & Western Railway Company, those districts forming part of what is generally referred to as the Outer Crescent." See *Bituminous Coal to Central Freight Association Territory*, 46 I. C. C. 66, 69. A petition for reargument before the whole Commission was denied on April 14, 1925; but an amended report and order was filed on May 19, 1925.

This suit was brought by the Virginian against the United States, the Interstate Commerce Commission, and the Chesapeake & Ohio, in the federal court for the Southern District of West Virginia, to enjoin the enforcement of the order and to set it aside. All three defendants answered, the Chesapeake & Ohio asserting its readiness to comply with the Commission's order. Several coal companies intervened as defendants. The case was heard, on May 28, 1925, before three judges upon application for an interlocutory injunction and also upon final hearing. The order was assailed mainly on the ground that the findings made were unsupported by evidence. It was also contended, among other things, that findings essential to the relief granted had not been made. Besides the full transcript of the proceedings before the Commission, the Virginian introduced, under objection, some additional evidence in support of a claim that the order should be set aside because of certain facts occurring since it was

entered. On September 19, 1925, the court entered a final decree denying the injunction and dismissing the bill on the merits. No opinion, written or oral, was delivered.

Before entry of the decree, the Virginian indicated an intention to appeal and asserted that irreparable damage would result, pending the appeal, if the decree should be reversed. Thereupon, the District Court included in the final decree a clause restraining enforcement of the Commission's order pending the perfecting and determination of the appeal. No. 282 is a cross-appeal by the United States and the Commission from so much of the decree as restrains enforcement of the Commission's order pending the appeal. No. 281 is the appeal by the Virginian, under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, from so much of the decree as denied the injunction and dismissed the bill. The contentions made by the Virginian here seem to be the same that were made by it below; and largely the same that it made before the Interstate Commerce Commission.

First. The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268. No irregularity in the proceedings before the Commission is even suggested.

Second. The Virginian contends that the specific facts found are, as matter of law, insufficient to support the finding of undue prejudice. The facts material are these.

Ever since the Virginian was constructed, it has adhered to the policy of providing for the output of mines on its line transportation only to tidewater. This policy is pursued, not only because it is deemed profitable to the company, but also because it enables the Virginian to furnish to shippers the most efficient service at reasonable rates. It has never held itself out as equipped to carry coal to the West, or joined in joint rates to western markets. The 45 mines on its line which enjoy the blanket rates to the West, have them as a natural result of certain trackage agreements entered into by the Virginian with the Chesapeake & Ohio for an entirely different purpose. The purpose was to secure additional eastbound tonnage without wasteful expenditure by paralleling branch lines. To be able to secure the eastbound traffic from certain mines located on independent lines connecting with the Chesapeake & Ohio, the Virginian, having acquired the independent lines, sought the right to use that system's tracks to those mines. As compensation for the trackage rights over the Chesapeake & Ohio, it gave that company the right to use the Virginian's tracks to these 45 mines. The carriers, instead of using these trackage rights by operating over the other's tracks, substituted, solely as a matter of economy and convenience, a reciprocal switching arrangement. As a result, the Virginian hauls westbound coal from these 45 mines to a junction with the Chesapeake & Ohio; the latter absorbs the switching charges of the Virginian; and these mines enjoy the same rate to the West as do those located on the Chesapeake & Ohio. But the Virginian's purpose in making the traffic agreement was solely to increase its eastbound traffic.

The fact that the Virginian's intention was not to give the 45 mines a preference over others, but to increase its own eastbound business from mines located on the other system, and that the preference resulting is merely an incident of a legitimate effort to develop the carrier's east-

bound traffic, is not of legal significance. These 45 mines to which the western market has been thus opened, obviously, enjoy thereby an advantage over the 54 mines, found to be similarly situated, to which the market is closed. And the Commission has found that the preference is unjust. In essence, the situation is the same as that considered in *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 523, and *United States* v. *Pennsylvania R. R.*, 266 U. S. 191, 199. The contention that there can be no order to remove the discrimination, because the Virginian is in no legal sense responsible for the lower western rates granted to the favored mines, is likewise disposed of by the earlier case. At pp. 520, 521.

Third. The Virginian contends that the evidence before the Commission does not support its finding that the rates on coal from the Virginian's mines *via* the Chesapeake & Ohio are unreasonable to the extent that they exceed the New River district rates maintained by the latter carrier from mines on its own and connecting lines having no other outlet to the western markets. The argument is that these rates can not be considered standards of reasonableness because, as the Commission declared in the present controversy, they are "the outcome of competitive strain and stress through long periods of development," and, as it had stated in an earlier case, they have been made "in practical, if not absolute, disregard of distance, and all transportation conditions that ordinarily are taken into consideration in the making of rates," and "are below the level at which maximum reasonable rates might be maintained." *Bituminous Coal to C. F. A. Territory,* 46 I. C. C. 66, 122, 145. The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the

Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541. It was shown that a huge coal traffic moves from this territory, under like operating conditions, at the blanket rates which were voluntarily established by the other carriers to serve mines similarly located. This fact, and much else in the voluminous record, afford substantive evidence to support the finding that the existing rates are unreasonable; and that those which the order directs are reasonable.

Fourth. The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under § 15(3). But the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. See *Through Routes and Through Rates*, 12 I. C. C. 163; *Memphis Freight Bureau* v. *Fort Smith & W. R. R. Co.*, 13 I. C. C. 1, 8; *Baer Bros. M. Co.* v. *Mo. Pac. Ry. Co.*, 17 I. C. C. 225; *Swift & Co.* v. *Pa. R. R. Co.*, 29 I. C. C. 464; *Lourie M'f'g Co.* v. *Cincinnati N. R. R. Co.*, 42 I. C. C. 448; *Kansas City Bd. of Trade* v. *A. T. & S. F. Ry. Co.*, 69 I. C. C. 185, 188–189; *St. Louis Southwestern Ry.* v. *United States*, 245 U. S. 136, 139, note 2. The fact that the combination rates were excessive constituted the only obstacle to the movement. The Chesapeake & Ohio did not oppose the reduction of its rates from the junction to the West. It was willing that these 54 mines on the Virginian should enjoy the rates already open to the other 45. The Virginian resisted a reduction of its local rate to the

junction. The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and nondiscriminatory. It did not order joint rates. And no question of divisions was before the Commission. The order was sought and made under § 1 and § 3. Section 15(3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law.[1]

Fifth. The Virginian contends that the order should be set aside because of the following facts which occurred after entry of the original order and before the hearing below. An agreement to lease the Virginian to the Norfolk & Western for 999 years was approved by the respec-

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[1] Thus in many cases, as in the case at bar, the Commission has found a combination through rate unreasonable or discriminatory as an entirety, and has ordered it to be not higher than a specific amount, without any finding of public interest. *United Verde Extension Co.* v. *Director General,* 57 I. C. C. 625; *Gillespie Coal Co.* v. *Ill. Traction System,* 62 I. C. C. 335; *Freight Bureau* v. *Beaumont, etc., Ry. Co.,* 74 I. C. C. 601; *Ariz. Corp. Comm.* v. *A. T. & S. F. Ry. Co.,* 87 I. C. C. 271; *Babbitt Bros. Trading Co. v. A. T. & S. F. Ry. Co.,* 88 I. C. C. 614; *Lone Star Gas Co.* v. *C. C. C. & St. L. Ry. Co.,* 101 I. C. C. 465; *Tioga Coal Co.* v. *B. & O. R. R. Co.,* 101 I. C. C. 611; *Lookout Paint M'f'g Co.* v. *Mo. Pac. R. R. Co.,* 101 I. C. C. 691; *Illinois Oil Co.* v. *Cape Girardeau N. Ry. Co.,* 102 I. C. C. 154; *Humble Oil & R. Co.* v. *L. & N. W. R. R. Co.,* 102 I. C. C. 761; *Eriksen* v. *Ann Arbor R. R. Co.,* 102 I. C. C. 374; *Omaha Grain Exchange* v. *Atl. N. Ry. Co.,* 102 I. C. C. 533; *Vera Chem. Co.* v. *Ala. Cent. R. R. Co.,* 104 I. C. C. 408; *Marion Machine Co.* v. *Pa. R. R. Co.,* 104 I. C. C. 471; *West Va. Paper Co.* v. *B. & O. R. R. Co.,* 104 I. C. C. 495; *Wilson & Co.* v. *C. & O. Ry. Co.,* 104 I. C. C. 641. Compare *Indianapolis Chamber of Commerce* v. *C. C. C. & St. L. Ry. Co.,* 58 I. C. C. 515; *Prairie Pipe Line Co.* v. *Director General,* 88 I. C. C. 167; *J. D. Hollingshead Co.* v. *Deering S. W. Ry. Co.,* 88 I. C. C. 659; *Public Service Comm.* v. *A. T. & S. F. Ry. Co.,* 88 I. C. C. 728; *Caruso & Co.* v. *Chi. & Eastern Ry. Co.,* 102 I. C. C. 619.

tive boards of directors of the two companies; approval by the stockholders was expected; and approval by the Interstate Commerce Commission was hoped for. In anticipation of such approval, the Virginian and the Norfolk & Western established and published through routes and joint rates, from substantially all mines on the Virginian to substantially all important markets in the West. The Virginian then filed, on April 27, 1925, a petition before the Commission to reopen the case and modify its order, so that the routes which had been opened *via* the Norfolk & Western in partial compliance with the order, should be accepted as the equivalent of full compliance; and the requirement of routes and rates *via* the Chesapeake & Ohio should be eliminated. That petition was denied on May 11, 1925. The Virginian contends that, in view of these facts, the order requiring transportation service also *via* the Chesapeake & Ohio is so unreasonable as to transcend the limits of the Commission's discretion, among other reasons because, through the duplication of routes not available to mines served only by the Chesapeake & Ohio and the Norfolk & Western, respectively, it would give to mines on the Virginian an undue preference and advantage. The argument urged in this connection is appropriate for consideration by the Commission, and has presumably been duly considered by it. The fact that it has not proved persuasive affords no basis for the contention that the Commission's action in making the order was arbitrary or otherwise illegal.[2]

Sixth. The cross-appeal is directed to so much of the final decree as stays enforcement of the Commission's order pending the appeal. It is settled that the force and effect of a decree of a federal court dismissing a bill and dissolving an interlocutory injunction are not suspended

[2] On July 2, 1925, the Norfolk & Western applied to the Commission for an order under § 5, par. 2, authorizing it to acquire the Virginian by lease. The application was denied on October 11, 1926.

as a mere consequence of an appeal to this Court, even if a *supersedeas* is allowed. *Hovey* v. *McDonald,* 109 U. S. 150, 161; *Knox County* v. *Harshman,* 132 U. S. 14. An injunction which was in terms dissolved by the decree, or which expired by limitation, cannot be revived to take effect during the pendency of an appeal except by a new exercise of power by a court having the authority. Ordinarily such authority is vested in the lower federal court, as well as in this Court. Under Equity Rule 74 the judge who allows the appeal may, if he took part in the decision of the cause, make, at the time of such allowance, an order continuing an interlocutory injunction which would otherwise be vacated. *Merrimack River Savings Bank* v. *Clay Center,* 219 U. S. 527, 535. Prior to the establishment of the Commerce Court, Act of June 18, 1910, c. 309, 36 Stat. 539, the circuit courts had jurisdiction of suits to enjoin or set aside orders of the Commission. Compare Act of June 26, 1906, c. 3591, § 5, 34 Stat. 584, 590. As an incident of that jurisdiction, they had the usual power to preserve the *status quo* pending an appeal. The Government contends that the rule theretofore prevailing was abrogated by the Act of 1910; and that, because of similar provisions in the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, the power in question was not conferred upon the district courts.

The latter Act, which abolished the Commerce Court and transferred to the district courts the jurisdiction in this class of cases, requires that applications for an interlocutory injunction to restrain the enforcement of an order of the Commission be heard before three judges; permits the issue by them, or a majority of them, of "a temporary stay or suspension" of the Commission's order for not more than sixty days pending the application for an interlocutory injunction; similarly permits them "at the time of hearing such application . . . [to] continue the temporary stay or suspension . . . until decision

upon the application"; provides for expediting the hearing; and authorizes a direct appeal to this Court from the order granting or denying the interlocutory injunction, if taken within 30 days. Compare *United States* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 306, 322. The argument of the Government is that the thing of which the operation is suspended, pending the appeal, is not the decree of the District Court, but the order of the Commission—an independent federal tribunal; that, by the language of the Act, the power of the district court to suspend the operation of the Commission's order ends with the "decision [in the district court] upon the application"; and that for these reasons, the customary power of a court of equity to preserve the *status quo* is not applicable to the suspension pending the appeal here involved.

It is clear that this Court, or a justice thereof, has power to grant a stay of the Commission's order pending the appeal. The power was exercised by the full Court in *Omaha & Council Bluffs Ry. Co.* v. *Interstate Commerce Commission*, 222 U. S. 582, in a case coming from the Commerce Court under the Act of 1910. Whether the district court of three judges under the Act of 1913 possesses like power has never been considered by this Court. The existence of the power was affirmed by a divided district court in *Louisville & N. R. R. Co.* v. *United States*, 227 Fed. 273, and the power was exercised to the extent of staying enforcement of the Commission's order until this Court should have the opportunity of determining whether a stay pending the appeal should be granted. The power has been exercised by the district court in a few other instances. But in those cases, although the Government objected to the action taken, it did not take a cross-appeal; and the question was not considered or raised upon the argument before

this Court.[3] The question now presented was, however, passed upon under similar legislation and conditions in *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission,* 260 U. S. 212. The practice there held appropriate in a proceeding under § 266 of the Judicial Code, must be held to be likewise authorized under the Act of 1913.

Section 266 provides for the hearing before three judges of applications for an interlocutory injunction to restrain the execution of a state statute, or of an order of an administrative board of the State pursuant to a state statute, where the statute or order is assailed on the ground that it violates the Federal Constitution. We declared in the *Cumberland Telephone & Telegraph Co.* case, p. 219, that while this Court has power to grant a stay pending the appeal, the district court acting through three judges, or a majority of them, also possesses that power; and that because such court is "best and most conveniently able to exercise the nice discretion needed . . . the court of three judges, who have heard the whole matter, have read the record, and can pass on the issue [application for a suspension pending the appeal] without additional labor," the determination of the application will ordinarily be left to it. The language of § 266 which limits the

[3] Opinions have been written by this Court in 32 direct appeals from decrees refusing to set aside orders of the Interstate Commerce Commission: 6 being from decrees of the Commerce Court under the Act of 1910, 26 from decrees of the district court under the Act of 1913. In 3 of those cases, the district court stayed the order of the Commission pending the appeal, either until this Court could pass upon an application for such a stay, *Louisville & Nashville R. R. Co.* v. *United States,* 227 Fed. 373; 242 U. S. 60; *Central R. R. of New Jersey* v. *United States,* 257 U. S. 247; or until this Court should decide the appeal, *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412. In one other case only was an application made to the lower court for a stay pending the appeal, and that was denied, *Colorado* v. *United States,* 271 U. S. 153. In so far as the records show, stays were not asked for below in the other 28 cases.

power to grant the restraining order and the interlocutory injunction is substantially the same as that employed in the Act of October 22, 1913. The two statutes are *in pari materia*. It is under § 266 that proceedings to enjoin the enforcement of rate-orders of state railroad and public utility commissions are commonly instituted.

The character of the proceeding and the end sought are the same in the two statutes. The two provisions originated in the same Act. Section 266 is a codification of § 17 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 557. The provision of the Act of 1913, here in question, is an adaptation to the district courts of § 3 of the Act of 1910, which prescribed the procedure for such applications before the Commerce Court. No reason is suggested why the rule governing in cases of appeals from the district court under § 266 should not apply also to appeals from those courts under the Act of 1913. Moreover, the latter Act, in referring in the same connection to appeals from final decrees, declares that "such appeals may be taken in like manner as appeals are taken under existing law in equity cases." Congress evidently deemed that it had adequately guarded against the dangers incident to the improvident issue of the writs of injunction in cases of this character by the provisions which require action by the court of three judges, which permit of expediting the hearings before the district court, which shorten the period of appeal, and which give a direct appeal to this Court.

Seventh. The Government contends that, even if the District Court had power to stay the order of the Commission pending the appeal in this Court, its action was not warranted by the facts. A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances

of the particular case. An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure.

In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court.[4]

[4] See *Louisville & Nashville R. R. Co.* v. *Railroad Commission,* 208 Fed. 35, 57–60; *Louisville & Nashville R. R. Co.* v. *United States,* 227 Fed. 273; *Corona Coal Co.* v. *Southern Ry. Co.,* 266 Fed. 726, 735. Compare *Cotting* v. *Kansas City Stock Yards,* 82 Fed. 850, 857;

The District Court made no finding or statement bearing upon its exercise of discretion in suspending the operation of the Commission's order, except the recital in the decree that from all the evidence in the case it is "of opinion . . . that irreparable damage will result to the complainant pending such appeal if this decree shall be reversed on appeal." We must therefore look elsewhere in the record for additional facts necessary to justify the suspension. We fail to find any. The suit was of a character deemed by Congress of such importance that it had made special provision for both adequate and speedy consideration. The strenuousness of the contest and the extensive record made clear the importance of the case not only to the mines and carriers directly concerned but also to the consuming public in the western markets. It was clear that the appeal bond could not indemnify the Virginian mines or the Chesapeake & Ohio Railroad for the loss resulting from a stay, and also that the public might suffer losses for which there would be no remedy. The decree was not entered until nearly four months after the hearing—that period being doubtless required for adequate consideration of the voluminous record. No opinion, written or oral was delivered. In view of the importance of the litigation, we interpret the absence of an opinion as tantamount to a declaration that upon careful scrutiny of the record the questions presented for judicial determination appeared to be simple; or, at all events, that the case did not involve the determination of any question of law which was novel or as to which there was, or could be, reasonable doubt. The decree of the District Court was not unanimous; but this fact alone would not justify a stay. For aught that appears, the District Court may

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Western Union Tel. Co. v. *Wright,* 168 Fed. 558, 559; *Louisville & Nashville R. R. Co.* v. *Siler,* 186 Fed. 176, 203; *Rail & River Coal Co.* v. *Yaple,* 214 Fed. 273, 283; *Chadeloid Chemical Co.* v. *H. B. Chalmers Co.,* 242 Fed. 71, 72; *Masses Publishing Co.* v. *Patten,* 245 Fed. 102.

have divided on some questions of fact, or on the construction of a document.[5] Under the circumstances appearing, the suspension of the order pending the appeal was unwarranted. The objection to the decree asserted by the Government in No. 282 must, therefore, be sustained.

Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true, where the case is in equity and the decree is entered upon a hearing involving complicated facts. For being in equity, matters of fact as well as of law are reviewable; and the reviewable issues of law are rarely sharply defined by requests for rulings. The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal. And the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor.

No. 281—Decree affirmed as to matter appealed from.
No. 282—Decree reversed as to matter appealed from.

EASTERN TRANSPORTATION COMPANY *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

No. 57. Argued December 7, 1926.—Decided January 3, 1927.

1. Abandonment within the thirty day period set by the Act of March 3, 1899, will not be presumed of a wreck left in a navigable

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[5] So far as the record discloses, the stay included in the final decree was not a continuation of a temporary restraining order, but a matter wholly original. Apparently, no restraining order issued prior to the final decree. The matter is not referred to in any of the briefs.

channel, for the purpose of relieving the owner from the consequence of failure to remove or mark it as that Act requires. P. 686.

2. The leaving of an unmarked wreck in a navigable channel, in a manner declared by the Act of March 3, 1899, to be unlawful, with resulting damage to another's vessel, is a maritime tort, which, when committed by the United States may be civilly remediable under the Suits in Admiralty Act, although also a crime under the Act of 1899. P. 687.

3. Under the Suits in Admiralty Act, March 9, 1920, which in lieu of earlier permission to proceed *in rem* against government merchant vessels and cargo, permits a libel *in personam* against the United States, with leave to the libelant to proceed in accordance with the principles of libels *in rem* whenever such a libel might have been maintained if the merchant vessel or cargo had been privately owned and possessed, and which provides also that election so to proceed "shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit," and that the United States shall be entitled to the benefit of all exemptions and limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels—a libel *in personam* may be maintained against the United States to recover for the loss of a vessel and cargo resulting from the failure of the United States to remove or mark the wreck of a vessel, which, while owned and used by it as a merchant vessel, was sunk in a navigable channel. P. 692.

Reversed.

APPEAL from a decree of the District Court which dismissed, for lack of jurisdiction, an admiralty suit, *in personam*, brought by the appellant against the United States to recover for a ship and cargo, lost by collision with the sunken and unmarked wreck of what had been a vessel owned and used by the United States solely as a merchant vessel. The Seaboard Transportation Company, originally a co-defendant, was dismissed by consent of the other parties.

Messrs. John M. Woolsey and *Edward R. Baird, Jr.*, for appellant.

By the Suits in Admiralty Act the United States consented to be sued in any proceeding in admiralty in which such a proceeding could have been maintained against a

private shipowner. Through the Shipping Act of 1916 and Merchant Marine Act, 1920, the liabilities of government-owned merchant vessels were the same as those of privately owned merchant vessels. *The Lake Monroe,* 250 U. S. 246. After these Acts had been in operation for some time it was realized that it might be a serious inconvenience to the Government to have its vessels delayed by arrests and subject to the requirement that they give bonds as a condition of their release. This situation resulted in the passage of The Suits in Admiralty Act of March 9, 1920, which made government-owned vessels, when operated as merchant vessels or tugs, responsible on the same basis as if they were being operated by a private owner. The Act abolished the right to arrest Government vessels by proceedings *in rem* and allowed " a proceeding in admiralty " to be maintained against the United States by libel *in personam,* with the proviso that if the libelant wished so to elect it might proceed against the Government on the same principle as if the libel had been a libel *in rem,* and the ship had been arrested. But such election was not to preclude the libelant in any proper case from seeking relief *in personam* in the same suit.

It is clear from the language used that what was implicit in the Shipping Act of 1916 and the Merchant Marine Act of 1920, as to the legal status of the Government and of Government-owned or operated vessels whilst employed as merchant vessels was made explicit by the Suits in Admiralty Act; that under the Act " proceedings in Admiralty " were to be maintainable against the United States when its liability arose out of the operation of one of its vessels as a merchant vessel; and that by such proceedings all liabilities imposed by law on private persons similarly engaged could be claimed against the United States with correlative rights in the United States to avail itself of all defenses and limitations of liability available under admiralty law and practice to a private owner.

There is not any limitation on the phrase "proceeding in admiralty." It is not limited to a proceeding in admiralty *in rem,* which would mean a case where a maritime lien would have been created against the vessel in question if she were held responsible for the tort or breach of contract which might be involved in the case. Of course, when the proceeding could only be maintained *in rem* if the vessel were privately owned, and the owner of the vessel would not be liable *in personam,* then you have a situation such as existed in the case of *Blamberg Bros.* v. *United States,* 260 U. S. 452. What was really decided in the *Blamberg* case was, that the Suits in Admiralty Act did not authorize a suit *in personam* against the United States as a substitute for a libel *in rem* against a vessel, (a) when the vessel was not available in a port of the United States and subject to the process of our courts, because in such a case the vessel of a private owner could not have been arrested; and (b) when the private owner would not have been liable to personal suit.

The Suits in Admiralty Act constituted, therefore, a consent on the part of the United States to be sued in any admiralty proceeding in which a private owner would be liable provided the vessel through which the liability arose was operated as a merchant vessel. This is a recognition of the feeling frequently expressed that when the Government goes into business it should assume the same liabilities as others. *The Charkieh,* L. R. 4 A. & E. 59; *Walton* v. *United States,* 24 Ct. Cls. 372; *St. Louis* v. *United States,* 33 Ct. Cls. 251. There have been a number of decisions in the lower courts which sustain the libelant's position that an *in personam* action will lie against the United States under the Suits in Admiralty Act even if an *in rem* action, which must be founded on a maritime lien, would not be maintainable if the vessel in question were privately owned. *Middleton & Co.* v. *United States,* 273 Fed. 199; *The Elmac,* 285 Fed. 665;

Agros Corp. v. *United States,* 8 Fed. (2d) 84; *The Isonomia,* 285 Fed. 516; *Stevedoring Co.* v. *United States,* 286 Fed. 444; *The Anna E. Morse,* 287 Fed. 364; *Thompson* v. *United States,* 4 Fed. (2d) 412; *The Faraby,* 1923 A. M. C. 468; *The Tug Nonpareil,* 1924 A. M. C. 312; *The Castlewood,* 298 Fed. 184, 5 Fed. (2d) 1013; *The Brush,* 1926 A. M. C. 91; Benedict, Admiralty, 5th ed., § 1924.

Proceedings in admiralty may be based on maritime torts or on maritime contracts. If the Suits in Admiralty Act had intended to limit the Government's liability to "cases not sounding in tort," as was done in the Tucker Act, appropriate language would have been employed. An instance where the United States has been held liable for a maritime tort under the Suits in Admiralty Act is *The Tug Nonpareil,* 1924 A. M. C. 312.

A private owner would have been liable to the libelant for the damages caused by his leaving the wreck of *The Snug Harbor* unbuoyed and unlighted in a frequented fairway. At common law there was and is a liability on the part of a wreck sunk in navigable channels, and of its owner, for damage caused by the wreck to other vessels unless he shall have properly marked it or abandoned it. This common law liability has been fixed and emphasized by the statute of March 3, 1899, and the decisions thereunder. There is no presumption of abandonment.

The wreck of *The Snug Harbor* lay in a frequented fairway within waters over which both the District Courts for the Southern and the Eastern Districts of New York have concurrent jurisdiction.

Mr. J. Frank Staley, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell, Assistant Attorney General Letts,* and *Mr. H. H. Rumble,* Attorney in the Department of Justice, were on the brief, for the United States.

Under the Act a vessel must have the status of a merchant vessel at the time the loss occurs. The *Snug Harbor* did not have such status at the time the *Winstead* struck her wreck, and she had become a total loss nine months before the libel was filed. We admit that, as between private parties, relief is properly had by libel *in personam* for failure to mark and buoy a wreck in navigable inland waters.

Four constructions of the Suits in Admiralty Act may be stated:

First, the Act substitutes a remedy *in personam* for the enforcement of the same liability which in the case of privately-owned vessels would be enforced by a proceeding *in rem*. *The Lake Monroe*, 250 U. S. 246; *Blamberg Bros.* v. *United States*, 260 U. S. 452; *Shewan & Sons* v. *United States*, 266 U. S. 108.

Second, the Act provides a remedy both upon principles of *in personam* liability and of *in rem* liability where the vessel involved at the time the cause of action arose was employed as a merchant vessel. Certain lower courts have so construed the Act. They reason that the language of § 2—" a proceeding in admiralty could be maintained "—should have this liberal construction. Citing many cases, and discussing *Agros Corp.* v. *United States*, 8 Fed. (2d) 84, and *The Isonomia*, 285 Fed. 516. These decisions suggest that the opinions of this Court in *Blamberg* v. *United States*, 260 U. S. 452; *Shewan & Sons* v. *United States*, 266 U. S. 108; and *Nahmeh* v. *United States*, 267 U. S. 122, must be limited to the questions presented. Each of the suits is based on *in rem* liability. The question in the first was whether an *in rem* suit would lie under the Act when the vessel was not within the United States; in the second, when the vessel was not " actually engaged in mercantile trade "; and in the third, when the vessel was not within the district in suit. The proviso of § 2, " that such vessel is employed as a merchant vessel," if the construction now suggested be sound, requires the cause of action, if based upon rights *in personam*, to be related

to the ownership, possession, or operation of a merchant vessel. At the time of the loss of the *Winstead,* the *Snug Harbor* had been sunk and totally lost and her identity as a vessel destroyed.

A third construction is that which the appellant here urges: That the Act permits suit against the Government on the admiralty side of the court, both *in personam* and *in rem,* in the same full measure that such actions are maintainable as between private parties. We deny such construction. The proviso—"provided that such vessel is employed as merchant vessel"—in plain terms, requires that the cause of action *in personam* be related to or grow out of the operation of government vessels employed as merchant vessels.

Fourth Construction. It has been suggested that the right to any relief under the Act is conditioned upon the vessel concerned having the status of a merchant vessel at the time the libel is filed and such vessel then being within the United States or its possessions. This libel was filed nine months after the *Snug Harbor* was lost. Upon such construction, relief under the Act has been denied. *Grace & Co.* v. *United States,* 8 Fed. (2d) 80; *Villigas* v. *United States,* 8 Fed. (2d) 300. It is to be observed it was not to enforce any liability of the wreck that the suit was brought. The gravamen of the complaint is the failure of the owner to mark the position of the wreck. No suit *in rem* against the wreck would have been possible. For such proceeding to be maintained, the court of admiralty must have the custody of the *res*—something of substance and value. In this case there was no *res.* In any view, the *Snug Harbor* then did not have the status of a merchant vessel.

Mr. Chief Justice Taft delivered the opinion of the Court.

The Eastern Transportation Company filed a libel in admiralty *in personam* against the United States in the

District Court for the Eastern District of Virginia, under the Suits in Admiralty Act of 1920, and against the Seaboard Transportation Company, as joint defendants. It averred that the libelant, a corporation of the State of Maryland, was the owner of the barge Winstead and the bailee of the cargo of the barge; that the Seaboard Transportation Company owned the tug Covington and the barge Pottsville; that on August 15, 1920, the steamship Snug Harbor, owned and used by the United States solely as a merchant vessel, while on a voyage from Baltimore, Maryland, to Portland, Maine, came into collision with the barge Pottsville in tow of the tug Covington, was sunk and became a total loss; that the wreck of the Snug Harbor lodged about 4¼ miles from Montauk Point in a frequented channel way within the harbors and inland waters of the United States; that it was not marked with a buoy or beacon by day or a lighted lantern by night; and was not removed by the United States or the Seaboard Transportation Company, and that no notice had been given or published advising mariners navigating the neighboring waters of the presence of the wreck; that the barge Winstead loaded with a full cargo of coal, on the 14th day of September, 1920, came into contact with the wreck and as a result was sunk, and it and its cargo became a total loss to the damage of the libelant in the sum of $105,000; that the collision between the Snug Harbor and the Pottsville was due to the negligence of both; that the collision of the Winstead with the wreck was without negligence of those engaged in her navigation, but was due to the unlawful presence of the wreck for which the respondents were jointly and severally responsible.

The United States District Attorney appeared specially for the Government, for the purpose of suggesting to the Court, that it was without jurisdiction so far as the United States was concerned; that the cause of action stated

related to a failure on the part of the officers and agents of the United States to perform a purely governmental function, or to the alleged negligence of such officers and agents in the performance of such a function, and created no liability on the part of the United States for which it was suable; that the cause of action in no way concerned a vessel employed as a merchant vessel; that the Suits in Admiralty Act was to prevent the arrest and detention of vessels owned or possessed by the United States then employed as merchant vessels, and it was only to prevent such arrest and detention and consequent interference with the operation of such vessels that the United States consented by the Act to be sued in respect to such vessels, and that the United States had never consented by the Act or otherwise to be sued in respect to a wreck or any object incapable of being employed as a merchant vessel; that the suit *in personam* provided for by the Act, was intended by Congress to be only a substitute for a suit *in rem* against such vessel itself, and by the terms of the Act could be brought and maintained only in cases where if such vessel were privately owned a suit *in rem* could be maintained against her at the time of the commencement of such action, and not then unless such vessel was employed as a merchant vessel at that time; that § 15 of the Act of March 3, 1899, making it the duty of the owner of any vessel or craft wrecked and sunk in a navigable channel immediately to mark it with a buoy or beacon by day and a lighted lantern at night, had no application to the United States of America, imposed no duty upon it, and created no liability for which it was suable in the District Court below or elsewhere.

This issue on jurisdiction was presented by a motion to dismiss, which was denied by the District Judge, on the ground that the question should be determined after the facts were elicited in the trial of the case. Subsequently the Judge reheard the suggestion of want of

jurisdiction and reached the conclusion on the facts alleged that the court was without jurisdiction and dismissed the libel.

The record shows that by consent of the other parties the Seaboard Transportation Company has been dismissed for reasons appearing to the court and to counsel. It further appears that all questions of mere venue are waived.

This appeal, upon a certificate of the District Judge that the dismissal had been solely for lack of jurisdiction, was brought directly to this Court on March 20, 1925, under § 238 of the Judicial Code, as it was before it was amended by the Act of February 13, 1925, in accordance with § 14 of that Act, c. 229, 43 Stat. 936.

The case before us turns on the proper construction of the Suits in Admiralty Act. It was approved March 9, 1920, ch. 95, 41 Stat. 525. Its first section provides that no vessel owned by the United States or by any corporation in which the United States or its representatives own the entire outstanding capital stock shall thereafter "in view of the provision herein made for libel *in personam* be subject to arrest or seizure by judicial process in the United States or its possessions."

By § 2 in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action, a libel *in personam* may be brought against the United States if the vessel is employed as a merchant vessel. The suit is to be in a District Court of the United States for the district in which the parties suing reside, or at their principal place of business or in which the vessel or cargo charged with liability is found. The libelant is forthwith to serve a copy of his libel on the United States Attorney for such district and mail a copy thereof to the Attorney General, and make a sworn return of such service and

mailing, to constitute valid service on the United States and the corporation.

The third section provides that the suits shall proceed and be heard according to principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, it shall include interest at the rate of 4 per cent. per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest is to run as ordered by the court. The decrees are subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. Then follows this language:

"If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed, a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit."

The United States is exempted from giving any bond, but it assumes liability to satisfy any decree in a cause in which a vessel of the United States has been arrested or in which a vessel previously possessed, owned or operated by the United States has been arrested, in which the United States is interested and of which it desires release as suggested by the Attorney General.

Section 6 directs that the United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

Section 7 provides that if any vessel or cargo of the United States is seized by process of a court of any country other than the United States, the Secretary of

State of the United States may, in his discretion, upon the request of the Attorney General, direct the proper United States consul to claim immunity from such suit and seizure and to execute a bond on behalf of the United States as the court may require for the release of the vessel or cargo.

Section 8 appropriates the sums needed to meet the final judgments against the United States authorized by the other sections of the Act.

In view of the fact that the wreck which did the damage was a total loss, we assume that there is no *res* upon which a recovery *in rem* could be based, and therefore that a suit as between private persons, if maintainable, must rest on the personal liability of the owner of the wreck and must be in principle *in personam* as distinguished from an action *in rem* against the vessel wrecked. Hence it is that the libelant must establish that, under the Suits in Admiralty Act, it was intended to give an action against the United States both in cases where the owner of the vessel would be personally liable, and in those where only the vessel would be liable.

The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires. It was this view which led us in *Blamberg Bros.* v. *United States,* 260 U. S. 452, to hold that, as the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted, the Act did not apply in cases in which the seizure of a merchant vessel of the United States could not be prevented by the Act, in a foreign port and court, where the immunity declared by Congress could not be given effect.

In the case at bar, the liability charged in this libel arose from occurrences under the Act of March 3, 1899,

c. 425, 30 Stat. 1121, 1152, § 15. The Act is one making appropriations for the construction, repair, and preservation of certain public works and rivers and harbors, and contains regulations for the establishment of harbor lines and for the removal of obstructions in navigable waters of the United States.

Its § 15 provides, among other things, that whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, it shall be the duty of the owner of such sunken craft immediately to mark it with a buoy or beacon during the day and a lighted lantern at night and to maintain such marks until the sunken craft is removed or abandoned; that the neglect or failure of the said owner so to do shall be unlawful; that it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same and prosecute such removal diligently, and failure to do so shall be construed as an abandonment of such craft and subject the same to removal by the United States as thereinafter provided.

Section 16 provides for penalties of fine or imprisonment for the violation of § 15 as for a misdemeanor, or by both, and provides that the wrecked vessel may be proceeded against summarily by way of libel in any district court in the United States having jurisdiction.

Section 19 provides for a period of 30 days before abandonment is complete unless legally established in less time. Under the averments of the libel, there is no presumption of abandonment, certainly not within the 30 days, merely to relieve the owner of the wreck of his affirmative duty during that time to protect commerce against its danger. *People's Coal Co.* v. *Second Pool Coal Co.*, 181 Fed. 609, affirmed 188 Fed. 892. We do not think that abandonment is a factor in this case.

It is first objected to the recovery here that it was not intended by the Suits in Admiralty Act to subject the United States itself to prosecution for a crime which it

denounces in its legislation. We need not be troubled by this objection, because there is no attempt here to prosecute the United States or any of its agents criminally. The declaration that the leaving of a wreck in a navigable channel in a place dangerous to passing steamers without notice of the danger and without immediate removal is unlawful, makes such omission a maritime tort which, if merchant vessels of the United States are to respond in tort, may be recovered for in its admiralty courts against the United States without anomaly. *The Fahy,* 153 Fed. 866; *The Macy,* 170 Fed. 930; *People's Coal Company,* 181 Fed. 609, 188 Fed. 892. Under the Tucker Act and the general jurisdiction of the Court of Claims, of course, the United States is made liable only upon a contract express or implied, and not for a tort; but its liability provided for in the Suits in Admiralty Act can not be limited to contracts any more than the liability of its merchant vessels under the Shipping Act of 1916 could be so limited. *The Lake Monroe,* 250 U. S. 246.

By the Shipping Act of 1916, approved December 7, 1916, c. 451, 39 Stat. 729, the United States Shipping Board was established for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States, and authority was given to that Board to purchase, lease or charter vessels suitable as far as the commercial requirements of trade of the United States might permit. By § 9, any such vessel while employed solely as a merchant vessel was made subject to all laws, regulations and liabilities governing merchant vessels, when the United States was interested therein as owner in whole or in part, or otherwise. It was under this provision that vessels belonging to the United States engaged as merchant vessels were arrested and held in an action *in rem.* In *The Lake Monroe,* 250 U. S. 246, we decided that such a merchant vessel was subject

to judicial process in admiralty for the consequences of a collision. It would seem clearly to follow that, under the Act of 1916, if a wreck of a merchant vessel of the United States in a navigable channel, not properly protected, caused damage to a vessel navigating the channel, the owner of the latter would have a remedy *in rem* against the wreck. Had the Suits in Admiralty Act not been passed and had the wreck become a total loss, there is nothing in the previous legislation, in the Act of 1916, or elsewhere, by which the Government could be made generally liable like a private owner for damages for failure to protect vessels against the wreck under the Act of 1899.

Did the Suits in Admiralty Act intend to extend and expand the *in rem* liability so as to make the United States so generally liable?

As we have already intimated, the main purpose of the Act, of relieving United States merchant vessels from seizure and arrest, would lead us to limit the operation of the Act to such a remedy as would be commensurate only with the immunity from seizure extended by the Act to United States merchant vessels, and to a proceeding which, while in form *in personam,* would be attended only with the incidents of a proceeding *in rem* as if against a vessel libeled, arrested, and released under a stipulation or bond by the United States to pay all damages. In spite of the purpose of the Act to create a substitute for a suit *in rem,* however, we are forced to the view by the language used in §§ 3 and 6 that it must be construed to have a wider effect than that which its § 1 would lead us to expect. The second section declares that in cases of immunity from arrest provided for in the first section, where, if the vessel or cargo had been privately owned or possessed, a proceeding in admiralty could be maintained at the commencement of the action, a libel *in personam* may be brought against the United

States. The expression "a proceeding in admiralty" is broad enough to cover both a libel *in personam* and a libel *in rem;* but if that were all we could properly limit its scope, purpose and incidents to that of a suit *in rem* merely transmuted into the form of an action *in personam.* The third section, however, provides that if the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels *in rem,* wherever it shall appear that had the vessel or cargo been privately owned or possessed, a libel *in rem* might have been maintained, but it then proceeds to say "But election so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit." It is impossible to reconcile this language with the idea that the action provided for is one which in form only is *in personam* against the United States, but which in fact is one having the limitations, operation and result of a suit *in rem.* The words certainly assume that there may be proper cases under the Act in which there is to be a remedy really *in personam* against the United States, and also one in substance *in rem* against its vessels for which its own personal liability is substituted. We have heard no suggestion or hypothesis which satisfies the provision for this double remedy thus expressly given, which would not include the general *in personam* liability of the United States as the owner of an offending vessel, like that of a private owner.

This view is further borne out by the sixth section, which provides that the United States shall be entitled to the benefit of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels. The necessary implication is that if, under the Harter Act (c. 105, 27 Stat. 445), or the Limitation of Liability Act, §§ 4282–4287, R. S., the United States as owner of a merchant vessel should not be able to show performance of the conditions upon

which such statutory limitations of liability are granted, it must assume the personal liability for negligence in such cases exactly as a private owner would.

This construction of §§ 2, 3 and 6 is sustained by the weight of authority in the lower courts. *Agros Corporation* v. *United States,* 8 Fed. (2d), 84; *The Anna E. Morse,* 287 Fed. 364; *Bashinsky Cotton Co.* v. *United States,* 8 Fed. (2d), 79; *Markle* v. *United States,* 8 Fed. (2d) 87; *Cross* v. *United States,* 8 Fed. (2d) 86; Benedict on Admiralty, 5th ed. vol. 1, § 194.

Do *Blamberg* v. *United States,* 260 U. S. 452; *Shewan & Sons* v. *United States,* 266 U. S. 108; and *Nahmeh* v. *United States,* 267 U. S. 122, militate against this view? In those cases the Court emphasized the main purpose in the Act to be to rid the United States of the inconvenience, to which it and its subordinate Shipping Corporations were subjected by having their vessels in the merchant trade arrested and seized under the Shipping Act of 1916, by substituting therefor a suit *in personam* against the United States with consequent appropriations to meet the liability thus imposed. We did not then have before us the question whether the statute substituted a remedy limited to what an action *in rem* would be with a statutory stipulation and bond of the United States to take the place of the vessel, or whether it created a broader personal obligation of the United States, both personal and *in rem,* like that of the private owner of a vessel. The question in the *Blamberg* case was whether the Act applied at all in cases in which there could be no immunity granted by Congress to vessels of the United States. The *Shewan* case only involved the question whether that which had been a merchant vessel of the United States continued to be such and satisfied the Act, if it were laid up and had not been changed to be a public vessel of the United States. The *Nahmeh* case was one of venue as to the district courts in which

suits could be brought under the Act, that is, whether only one of three courts described in the Act, or any one of the three could be used in each instance. Neither case involved the important question now before us; and while the emphasis placed in those cases upon the main purpose of the Act, as that of the mere substitution of a remedy for a proceeding *in rem* against merchant vessels of the United States, and its effect on its interpretation, may have been too marked, there is nothing in their decision inconsistent with the conclusion which we have here reached.

It is finally insisted for the Government that recovery against the Government under the Suits in Admiralty Act, whether *in personam* or *in rem,* must be on a cause of action related to or growing out of the operation of Government vessels employed as merchant vessels and that, as the collision with the wreck was not with a vessel employed as a merchant vessel, the Act does not apply. We think this reasoning to be too fine. What the statute means by saying "employed as a merchant vessel," is that the vessel shall belong to that class as distinguished from one employed in the governmental service—not necessarily that it shall be actively thus employed at the time of the collision. *Shewan & Sons* v. *United States, supra.* The cause of action grows out of the responsibility of the Government for a merchant vessel which in the course of its employment had become a danger to navigation and which imposed a duty to avoid that danger. A wreck which is a total loss will not furnish basis for an action *in rem,* as we have assumed; but if a proceeding in admiralty permitted by the Act embraces the principles both of suits *in personam* and suits *in rem,* it is a most natural construction of the Act dealing with merchant vessels employed by the United States, to include as a suit *in personam* it permits, one for a tort caused by the negligence of the United

States in dealing with a wreck of its merchant vessel and its failure to comply with its own navigation laws therewith.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

Reversed.

POSTUM CEREAL COMPANY *v.* CALIFORNIA FIG NUT COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 22. Submitted November 9, 1926.—Decided January 3, 1927.

1. A proceeding in the Court of Appeals of the District of Columbia under § 9 of the Trade Mark Act of 1905, to review a decision of the Commissioner of Patents refusing to cancel the registration of a trade mark, is an administrative matter, and not a "case" within the meaning of Art. III of the Constitution. P. 698.
2. This Court, therefore, has no constitutional power to review the decision of the Court of Appeals in such a proceeding—not even when that court dismisses the appeal from the Commissioner for want of jurisdiction under the Trade Mark Act. P. 699.

Appeal from 53 App. D. C. 320, 290 Fed. 340, dismissed.

APPEAL from a decision of the Court of Appeals of the District of Columbia in a proceeding to review a decision of the Commissioner of Patents refusing to cancel the registration of a trade mark. The decision of the court below dismissed the appeal for lack of jurisdiction under the Trade Mark Act. An application to this Court for a writ of certiorari was denied, 266 U. S. 609.

Messrs. Edward S. Rogers, Frank F. Reed, and *William J. Hughes* for appellant, submitted. *Messrs. John S. Prescott* and *Allen M. Reed* were also on the brief.

The decree of the Court of Appeals dismissing the appeal for want of jurisdiction is a final decree capable of review by this Court on appeal. *Baldwin Co.* v. *Robert-*

son, 265 U. S. 168. Should the Court be of opinion that the case is not properly before it on appeal, the order denying the petition for a writ of certiorari should be rescinded and the writ allowed. *Security Trust Co.* v. *Dent,* 187 U. S. 237; *Federal Trade Comm.* v. *Klesner,* writ of certiorari granted October 26, 1925, 269 U. S. 545.

As the decree of the Court of Appeals dismissed the appeal for want of jurisdiction, it necessarily is a final decree. *Baldwin Co.* v. *Robertson, supra,* citing *Shaffer* v. *Carter,* 252 U. S. 37. The decrees of the Court of Appeals of the District of Columbia, which are not final, are the rulings which are advisory to the Patent Office. This is not that kind of case. When the litigation is terminated and nothing remains to be done but to carry what has been decreed into execution, such a decree has always been held to be final for the purposes of an appeal. *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180; *Mower* v. *Fletcher,* 114 U. S. 127; *Lodge* v. *Twell,* 135 U. S. 232; *Kingman & Co.* v. *Western Mfg. Co.,* 170 U. S. 675; *Wetmore* v. *Rymer,* 169 U. S. 115; *Huntington* v. *Laidley,* 176 U. S. 668.

The decision of the Court of Appeals was based upon its construction of the Trade-Mark Act of March 19, 1920, 41 Stat. 533, made in *U. S. Inner Tube Co.* v. *Climax Rubber Co.,* 53 App. D. C. 370. In that case it held that as § 6 of the Trade-Mark Act of 1920, in carrying over into that Act certain sections of the Trade-Mark Act of February 20, 1905, 33 Stat. 727, omitted § 9, and as § 9 authorized appeals from the Commissioner of Patents to the Court of Appeals, there now exists no right of appeal in proceedings brought under the latter Act. The construction of this law of the United States was necessarily brought in question by or on behalf of the defendant.

The only final judgments and decrees of the Court of Appeals which may not be reviewed on appeal or writ of

error are those " arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases." While the trade-mark laws are administered by the Commissioner of Patents, they are not " patent laws," and therefore the judgment complained of does not fall within the exceptions of § 250. *South Carolina* v. *Seymour,* 153 U. S. 353.

The Act of January 28, 1915, 38 Stat. 804, amending § 128 of the Judicial Code, which provided, among other things, the classes of cases which should be final in the Circuit Court of Appeals by adding thereto cases " under the trade-mark laws," applied only to that court and did not affect cases in the Court of Appeals of the District of Columbia. On the other hand, this Court has reviewed trade-mark cases on certiorari under § 128 of the Code, now amended by the Act of February 13, 1925, 43 Stat. 936. See *Hutchinson Co.* v. *Loewy,* 217 U. S. 457; *Street & Smith* v. *Atlas Mfg. Co.,* 231 U. S. 348.

The jurisdiction of the Court of Appeals under the Act of 1905 was not divested by implication by the Act of 1920. The reasoning of the Court of Appeals would compel the conclusion that practically the whole Trade-Mark Act of 1905 was repealed by the Act of 1920, and would result in a complete breakdown of the existing trade-mark practice.

The decree of the Court of Appeals denies to owners of trade-marks in proceedings involving their registration any relief from erroneous decisions of the Patent Office.

No appearance for appellee.

Mr. Chief Justice Taft delivered the opinion of the Court.

The Postum Cereal Company and its predecessors in title have for years manufactured a cereal breakfast food to which they applied, as a trade-mark, the word " Grape-

Nuts," for which they secured registrations under the Trade-Mark Registration Act of February 20, 1905 (38 Stat. 727) and amendments. They filed a petition of opposition to the registration by the California Fig Nut Company of the trade-mark "Fig-Nuts" which that company had registered under the Act of March 19, 1920, § 1, par. b, 41 Stat. 533.

Section 2 of the same Act provides that when any person shall deem himself injured by the registration of a trade-mark under the Act, he may apply to the Commissioner of Patents to cancel it. Upon due notice to the registrant, a hearing is to be had before an examiner of interferences in the Patent Office, with an appeal to the Commissioner. The California Fig Nut Company, the registrant, filed an answer denying that the petitioner was injured and taking issue within the averments of its petition. The examiner of interferences held against the petitioner and recommended that the registration be not canceled. An appeal was taken to the Commissioner of Patents, who affirmed the holding of the examiner of interferences.

An appeal was then taken from the decision of the Commissioner to the Court of Appeals of the District of Columbia. That court held that under the Act of March 19, 1920, 41 Stat. 533, there was no jurisdiction given to that court to hear an appeal from the Commissioner of Patents. This holding was in accordance with a previous decision of the same court in *United States Compression Inner Tube Company* v. *Climax Rubber Company,* 53 App. D. C. 370; 290 Fed. 345. Accordingly the appeal was dismissed. The present appeal to this Court was allowed by the Court of Appeals.

The Trade-Mark Act of 1920, c. 104, 41 Stat. 533, is entitled "An Act to give effect to certain provisions of the convention for the protection of trade-marks and commercial names made and signed in the City of Buenos

Aires in the Argentine Republic, August 20, 1910, and for other purposes." The first section provides that the Commissioner of Patents shall keep a register of all trade-marks communicated to him by the international bureaus as provided for by the Convention upon which a certain fee has been paid. Par. b of § 1 provides that all other trade-marks not registerable under the Act of February 20, 1905 (with certain exceptions not here relevant), but which have been in *bona fide* use for not less than one year in interstate or foreign commerce, upon or in connection with any goods of a proprietor, upon which a fee of $10 has been paid to the Commissioner of Patents, may be registered under the Act, provided that the trade-marks which are identical with the known trade-marks owned and used in interstate commerce by another, and appropriated to merchandise of the same descriptive properties so as to be likely to cause confusion or mistake in the mind of the public or deceive purchasers, shall not be placed on the register. The chief objection of the petitioner to the registration of "fig-nuts" as a trade-mark for a cereal breakfast food is that it is likely to cause confusion or mistake and deceive purchasers into thinking they are buying the petitioner's breakfast food marked and widely known as "grape-nuts."

Section 6 of the Act of 1920 adopts provisions of certain sections of the Act of February 20, 1905, 33 Stat. 728. But those sections do not include § 9 of the older Act by which provision is made for an appeal from the decision of the Commissioner of Patents to the District Court of Appeals, and for this reason the District Court of Appeals dismissed the appeal. The contention of the appellant here is that § 9 of the Act of 1905 does apply to the proceeding here taken under the Act of 1920, and that the Court of Appeals in holding otherwise denied a right which the appellant here is entitled to have vindicated. It asks this Court to reverse the dismissal by the District Court of Appeals and in effect enforce the jurisdiction of

that court to entertain its appeal from the Commissioner of Patents.

The first difficulty the appellant has to meet is the question whether this Court has jurisdiction to consider such an appeal. The argument the appellant makes is that this appeal was allowed July 1, 1924, to the judgment of dismissal by the Court of Appeals of April 7, 1924; that the Act of February 13, 1925, 43 Stat. 936, 941, amending § 250 of the Judicial Code left the old section applicable to such pending appeal; that, by the old § 250, any final judgment or decree of the Court of Appeals might be reëxamined in this Court upon error or appeal in cases in which the construction of any law of the United States is drawn in question by the defendant; that this appeal draws in question the construction of the Trade-Mark Act of 1920 given by the Court of Appeals, by which that court dismissed the appeal taken to it from the Commissioner of Patents; and that the dismissal from which this appeal was allowed was a final judgment under the cases of *Shaffer* v. *Carter,* 252 U. S. 37, 44 and *Baldwin Co.* v. *Robertson,* 265 U. S. 168. The case of *Baldwin* v. *Howard,* 256 U. S. 35, in which certiorari to this Court from a similar trade-mark proceeding was denied, is explained by the appellant as resting on the sole ground that the judgment below was not a final one.

We do not think this course of argument can be sustained. Assuming for the purposes of this discussion, that the District Court of Appeals was wrong in not holding that § 9 of the Act of 1905 did apply to the Commissioner of Patents' decision under the Act of 1920, even so, an appeal can not be taken to this Court to remedy the error. The decision of the Court of Appeals under § 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court

which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal taken under it the same rules which under § 4914 R. S. apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. *Butterworth* v. *Hoe,* 112 U. S. 50, 60; *Gaines* v. *Knecht,* 27 App. D. C. 530, 532; *Atkins* v. *Moore,* 212 U. S. 285, 291. Neither the opinion nor decision of the Court of Appeals under § 4914 R. S., or § 9 of the Act of 1905, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this Court, which can only review judicial judgments. This Court has so decided in *Frasch* v. *Moore,* 211 U. S. 1, in an appeal as to patent proceedings, and in *Atkins* v. *Moore,* 212 U. S. 285, as to appeals in trade-mark proceedings. This was the *ratio decidendi* of *Baldwin* v. *Howard,* 256 U. S. 35, already referred to, where both appeal and certiorari were denied in a similar trade-mark proceeding.

It was said in these cases that the appeal was denied because the action of the Court of Appeals was not a final judgment. This reason was a true one, but it should not be understood to imply that, in such a proceeding, circumstances might give it a form that would make it a final judgment subject to review by this Court. That is the error that the appellant here has made in pressing its appeal. Appellant relies on *Shaffer* v. *Carter,* 252 U. S. 37, 44, holding that a judgment of dismissal for lack of jurisdiction is a final judgment for purposes of appeal. But the citation has no application in such a case as this. For here the action of the Court of Appeals in its dismissal was dealing with something which, even

if it should have been received, was not in the proper sense a judgment at all. Whatever the form of the action taken in respect of such an appeal, it is not cognizable in this Court upon review, because the proceeding is a mere administrative one.

The distinction between the jurisdiction of this Court, which is confined to the hearing and decision of cases in the constitutional sense, and that of administrative action and decision, power for which may be conferred upon courts of the District, is shown in the case of *Keller* v. *Potomac Electric Company,* 261 U. S. 428, 440, 442, 443. There it is pointed out that, while Congress in its constitutional exercise of exclusive legislation over the District may clothe the courts of the District not only with the jurisdiction and powers of the federal courts in the several States but also with such authority as a State might confer on her courts, *Prentis* v. *Atlantic Coast Line Company,* 211 U. S. 210, 225, 226, and so may vest courts of the District with administrative or legislative functions which are not properly judicial, it may not do so with this Court or any federal court established under Article III of the Constitution. Of the jurisdiction of this Court, we said, at p. 444:

"Such legislative or administrative jurisdiction, it is well settled, can not be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskrat* v. *United States,* 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court and of the inferior courts of the United States, ordained and established by Congress under and by virtue of the third article of the Constitution, is limited to cases and controversies in such form that the judicial power is capable of acting on them; and does not extend to an issue of constitutional law framed by Congress for

the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies." See also *Liberty Warehouse Co.* v. *Grannis,* decided this day, 273 U. S. 70.

With this limitation upon our powers, it is not difficult to reach a conclusion in the present case. We should have had no power to review the action of the District Court of Appeals if it had heard the appeal and taken administrative jurisdiction, and by the same token have now no power to review its action in refusing such jurisdiction.

But it is said that this leaves the appellant without any remedy to review the decision of the District Court of Appeals and makes its conclusion final in respect of the construction of the Trade-Mark Act of 1920. Even if this be so, as to which we express no opinion, it can not furnish a reason for exceeding the constitutional powers of this Court.

The appeal is dismissed.

LOS ANGELES BRUSH MANUFACTURING CORPORATION *v.* JAMES, DISTRICT JUDGE.

MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS.

No. —, Original. Motion submitted October 25, 1926.—Denied January 3, 1927.

1. In the exercise of its appellate jurisdiction to issue writs of mandamus, under Jud. Code § 234, and in fulfilment of its power under Rev. Stats. § 917, to regulate the equity practice, this Court has discretion to issue the writ directly to the District Court in a case of which it has ultimate power to review the merits, for the purpose of inquiring into and correcting a practice of assigning all patent causes to a master, adopted by the District Judges, in alleged disconformity to the Equity Rules. P. 705.
2. Under Equity Rules 46 and 59, trials are, generally, to be oral, in open court, and references to a master exceptional, and this applies to patent cases. P. 706.

3. District Courts must exercise a discretion in reference to the order of business; and congestion of the calendar with many cases, including a large number of criminal cases, ahead of the patent cases, may furnish cause for referring the patent cases to a master. P. 707.

Leave to file denied.

ORIGINAL application for leave to file a petition for mandamus directed to one of the District Judges of the Southern District of California.

Mr. Ford W. Harris was on the brief for petitioner in support of the motion.

No appearance for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a motion for leave to file a petition for mandamus by the Los Angeles Brush Manufacturing Corporation, against a Judge of the United States District Court for the Southern District of California. The petitioner is a defendant in two patent suits pending in that court, in one of which the Stabler Parker Company is complainant; and W. B. Clancy and others are complainants in the other. The suits are bills in equity brought to restrain the defendant from infringement of a patent for a new and improved brush. The defendant answered and the complainants moved to set the two cases for trial. Counsel for the complainants said that while his clients would prefer to try the case before the court, he would ask, if the court had not time to try them, that the cases be referred to a special master. Counsel for the defendant objected to such a reference, and said that if the reference was to be made, he would like to have a notation in the record that no showing had been made of exceptional circumstances, and that the cases were referred to the master over his objection. Thereupon the following order was made in each case:

"This cause now appearing on the call of the Court's calendar to be set for trial, and it being the desire of both counsel for the plaintiff and defendant, as expressed in open Court, that a date be fixed for the trial hereof, and counsel for the plaintiff insists that, because of alleged acts of infringement committed by the defendant, plaintiff will suffer damage by reason of the great delay in the hearing and determination of the issues herein; and it appearing that because of the congestion of the Court's calendar there are many other causes entitled to be first heard, including a large number of criminal causes which are entitled to preference over civil matters as to the trial thereof; and it further appearing that, because of the protracted length of patent trials, the result has been and is that other civil litigants having causes to be tried have not been accorded a fair proportion of the time of the Court; and it appearing that this condition will continue unless many of the patent cases, including this cause, now pending can be disposed of in the manner herein provided, and, hence, that in order to fairly and within a reasonable time dispose of the business before the Court, it is necessary that this order be made:

"It is now ordered, that this cause be referred to Charles C. Montgomery, Esq., Standing Master in Chancery, to take and hear the evidence offered by the respective parties and to make his conclusions as to the facts in issue and recommend the judgment to be entered thereon; the Standing Master in Chancery is authorized and empowered to do all things and to make such orders as may be required to accomplish a full hearing on all matters of fact and law in issue in this cause; the objection of counsel for the defendant to the making of this order referring the cause to the Master is hereby noted and an exception is allowed in favor of the defendant."

Thereupon the defendant filed this petition asking a rule against the Judge to show cause why a mandamus

should not issue directing him to vacate the order of reference to the master and to place the causes on the calendar for trial in open court. He says that he is informed and believes that at some time prior to July 12, 1926, the judges of the United States District Court, Southern District of California, by mutual agreement, appointed Montgomery as standing master to try patent causes; that at the calling of the term calendar in July, 1926, and at divers times since, all the district judges have announced in open court and in chambers that they would not personally try all causes involving patents for invention but would refer substantially all such causes to said standing master; that the result is that the standing master has set up a court with an extensive docket; that the causes here in question are ordinary and extremely simple patent causes which can be quickly and expeditiously tried, as will appear from the records therein; that the principal reasons given for the action by the court is that patent causes sometimes require protracted trials and that the court calendar is now, and has been for some years, rather congested, but that this condition is not exceptional but quite usual in most of the district courts and promises to continue indefinitely. The petitioner avers that it has an established right under the Equity Rules to a trial in open court; that the petitioner has no other remedy than application to this Court to act under the supervisory authority established by § 234 of the Judicial Code, 1 Stat. at Large 80, and in accordance with *Virginia* v. *Rives,* 100 U. S. 313; that unless this application is granted, the litigants in patent causes in the Southern District of California will be forced at their own expense to maintain a patent court set up by the judges of the District Court and operating in defiance of the plain intent of the Equity Rules; that by thus singling out patent cases such judges have unjustly and arbitrarily discriminated against a certain class of litigants and sub-

jected those litigants to unnecessary trouble and expense, because proceedings before a master are invariably protracted and expensive, and the cost of such proceedings must be borne by the litigants.

By § 917 of the Revised Statutes, this Court is given power from time to time, in any manner not inconsistent with the laws of the United States, to regulate the whole practice to be used in suits in equity or admiralty by the district courts—*Weyman* v. *Southard,* 10 Wheat. 1. This was taken from § 13 of the original Judiciary Act, 1 Stat. 80, c. 20. The same 13th section provided that the Supreme Court should have appellate jurisdiction to issue writs of mandamus in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States. This part of the original § 13 became embodied in § 688 of the Revised Statutes and is now to be found in § 234 of the Judicial Code.

In *Virginia* v. *Rives,* 100 U. S. 313, at p. 323, Mr. Justice Strong, speaking for the court in reference to writs of mandamus which the Supreme Court might issue, said:

" In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed."

The hearing of these causes in review would normally be had in the Circuit Court of Appeals of the Ninth Circuit, and they could only come here in due course by applications for certiorari and the granting of them. We do not need to decide whether the intervention between

this Court and the District Court of an intermediate appellate court would prevent the issue of mandamus by this Court direct to the District Court, in matters in which the Circuit Court of Appeals would or should ordinarily have power to issue a mandamus to the same end in aid of its appellate jurisdiction. However that may be, we think it clear that where the subject concerns the enforcement of the Equity Rules which by law it is the duty of this Court to formulate and put in force, and in a case in which this Court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them. *Ex parte Abdu,* 247 U. S. 27, 28; *Ex parte Crane,* 5 Peters 190, 192, 193, 194. This is not to say that in every case where the Equity Rules are the subject of interpretation and enforcement in the District Court, such questions may as of course be brought here and considered in a direct proceeding in mandamus. The question of thus using the writ of mandamus would be a matter of discretion in this Court, and it would decline to exercise its power where the issue might more properly come up by mandamus in an intermediate appellate court or in regular proceedings on review. If it clearly appeared, however, that a practice had been adopted by district judges, as to the order or procedure in hearing causes, at variance with the equity rules, our writ might well issue directly to such judges.

Rule 46 requires that in any trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or the rules, and that the Court shall pass upon the admissibility of all evidence offered as in actions at law. Equity Rule 59 provides that, save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. These rules were adopted by this Court

after a thorough revision. Committees of the Bar from the nine different circuits were invited to assist the Court in the matter. The Court, after much consideration, concluded that the then method of taking evidence in patent, and other causes in equity, had been productive of unnecessary expense and burden to the litigants and caused much delay in their disposition, and that the effective way to avoid the making of extended records, unnecessary to a consideration of the real issues of the causes, was to require, so far as it might be possible and practicable, that the evidence taken in patent and other cases should be taken in open court, and that only in exceptional cases should the cause be referred after issue to a special master. Though there has been some criticism and complaint of the inconveniences that arise from this change of the rules, the Court is strongly convinced that the change has justified itself; and it has no purpose to amend the provisions of Rule 46 and Rule 59. Were it to find that the rules have been practically nullified by a district judge, or by a concert of action on the part of several district judges, it would not hesitate to restrain them. One of the causes for complaint of the general administration of justice is the expense it entails upon the litigants; and, so far as it reasonably may do so, this Court is anxious to minimize the basis for such complaints. There is no reason why a patent litigant should be subjected to any greater expense than any other litigant, except as it may be involved in the inherent and inevitable difference between the presentation of the issues as to the merit and validity of a patent grant, and that which obtains in the litigation of an ordinary bill for relief in equity, or of an action at law upon a debt or for a tort.

Of course, courts must exercise a discretion in reference to the order of business to be conducted before them, and all the cases can not be heard at once. It is in the interest of economy of time that there should be hearings, first

in one class of cases, and then in another, provided each class may be given an opportunity within a reasonable time. Arguments based on humanity and necessity for the preservation of public order require that criminal cases should be given a reasonable preference; but even this must be conceded with moderation, and what time there is of the court, in view of the whole docket, must be equitably distributed. The reason given in the order for referring these cases to a special master is that there is congestion in the court's calendar and that there are many other cases entitled to be heard first, including a large number of criminal causes which should be preferred over civil causes as to the trial thereof, that other civil litigation has not been accorded a fair proportion of the time of the court, and that the condition will continue unless many of the patent cases, including this cause, be disposed of by such a reference.

In view of the recitals of the order, we are not inclined to infer that there has been any deliberate abuse of discretion in this matter, or to hold that there may not sometimes be such a congestion in the docket as to criminal cases as would justify a district judge in not literally complying with the requirements of the two rules in question. There has been an emergency, due to a lack of judges in some districts, which we can not ignore. We shall therefore deny leave to file this petition, but are content to state our views on the general subject, with confidence that the district judges will be advised how important we think these two rules are, and that we intend, so far as lies in our power, to make them reasonably effective for the purpose had in view in their adoption.

Leave denied.

Counsel for Parties.

EMMONS COAL MINING COMPANY ET AL. *v.* NORFOLK & WESTERN RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 70. Argued December 10, 1926.—Decided January 3, 1927.

A tariff governing demurrage at a coal-loading port provided that a car should be considered released when a vessel registered for the cargo or fuel supply of which the coal was part, or when the car was unloaded prior to such registry; that to avoid delay of switching out and delivering on shipper's order in actual sequence of their arrival cars containing the same grade of coal, "the dates on which cars should have been released will be substituted for those on which equivalent tonnage was actually delivered, and detention will be computed on the basis of such substituted dates"; and that the date when a shipment was transferred by written order and acceptance to another party should be the date of release of the car as to the original consignee, and subsequent detention should be charged to new consignee without free time allowance. *Held*, that a decision of the Interstate Commerce Commission should be followed which construed these provisions as applicable when, pursuant to a pooling and exchange arrangement among several shippers, the loaded cars of one shipper were delivered on the order of another, like cars of the former being retained for the latter and detention chargeable to the latter being computed from the notice of arrival of his own coal to time of delivery on his order of the substituted tonnage. P. 712.

3 F. (2d) 525, affirmed.

ERROR to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court (287 Fed. 168) in favor of the Railway, in its action to recover demurrage charges from the Coal Company and its surety, the Fidelity & Casualty Company of New York.

Mr. J. T. Manning, Jr., with whom *Mr. William G. Wright* was on the brief for plaintiffs in error.

Mr. J. Hamilton Cheston, with whom *Messrs. F. M. Rivinus* and *Theodore W. Reath* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by the Norfolk and Western Railway Company to recover demurrage on cars at Lambert's Point, Virginia, from the Emmons Coal Mining Company and its surety. An affidavit of defence upon matters of law was filed, but was held insufficient by the District Court, 287 Fed. 168, and judgment subsequently was entered for the plaintiff. The judgment was affirmed by the Circuit Court of Appeals. 3 F. (2nd) 525.

To facilitate the delivery of coal at tidewater some of the owners of mines upon the lines of the Railway made an arrangement with the latter by which the cars were sorted at Lambert's Point upon different tracks according to the quality of the coal, and delivery was made to their respective customers from the cars most convenient at the moment, irrespective of ownership, if the seller had that amount of coal on hand in cars within the space limits agreed. To work this out the parties formed an association, called the Lamberts Point Coal Exchange, with a manager who kept books in which he credited to each owner coal destined to the Point as soon as it passed Bluefield, West Virginia, noting its quality, and ordered delivery within the amount so credited, as required, to the owner's customers. If the delivery were required to be from the consignor's own cars, as it would be in the absence of agreement, of course if the cars were detained beyond the allowed time demurrage would be payable. When under the arrangement one member's cars were emptied to fill the order of another member, other cars with similar coal would have to be kept, in order to satisfy the first member's right when it came to assert it, and it should pay as in the first case, since the delay would be the same to the railroad whichever of its cars were detained. The responsibility of the owner for them is the

natural corollary of the benefit that each owner gets by having its order filled from the nearest cars.

In the present case the demurrage demanded is fixed by the foregoing rule. The plaintiffs in error say that by the tariff that governs the matter they can be charged only for the cars actually used and detained by them; that to make the tariff cover a substitution it must be modified by the rules of the Exchange, which cannot be done, and that if there is a claim against anyone, it is a claim against the Lamberts Point Coal Exchange.

The last point may be dispatched in a few words. The articles of organization of the Exchange provide that the member shall be responsible to the Railway for demurrage, and that the shipping instructions, &c., "shall show as the consignee the name of the member for whose account shipped, followed by the words 'care Lamberts Point Coal Exchange Pool—.'" The Coal Company's consignments were in accordance with the agreement, and by the agreement or without it made the Company the consignee. We come therefore to the tariff the construction of which is the only point much argued in the case.

The important clauses are in Rule 3, and Rule 4.

"(b) A car shall be considered as released:

"1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.

"2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage

was actually delivered and the detention will be computed on the basis of such substituted dates.

"3. The dates shipments are transferred by written order and acceptance to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance."

* * * * *

"Rule 4.—Demurrage Charges

"Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car: the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month."

These clauses were construed by the Interstate Commerce Commission in an able opinion as authorizing the 'substitution of any car containing a similar grade of coal for the one ordered dumped,' when the parties have so agreed, and as warranting the charges questioned here. They also were held reasonable as so construed. *Smokeless Fuel Co.* v. *Norfolk & Western Ry. Co.*, 85 I. C. C. 395. The matter is one upon which the opinion of the Commission would carry great weight, even if we thought its conclusion less obvious than we do. See also *Smokeless Fuel Co.* v. *Chesapeake & Ohio Ry. Co.*, 142 Va. 355. The fairness and reasonableness of it ought to prevail against meticulous arguments drawn from the fact that

the rules are made with unassociated shippers most prominently in mind, or from rarely realized possibilities of demurrage being charged where coal is delivered on the credit of cars actually in transit from Bluefield, although those cars are not delayed. In the ordinary course of things cars will be kept on hand to answer the mine owner's credit, and it is for its as well as for the Railway's advantage that they need not be the very cars that the mine owner has used.

Judgment affirmed.

MILLER ET AL., EXECUTORS, *v.* MILWAUKEE.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 73. Argued December 13, 1926.—Decided January 3, 1927.

1. Conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. P. 715.
2. Where income from bonds of the United States which by Act of Congress is exempt from state taxation is reached purposely, in the case of corporation-owned bonds, by exempting the income therefrom in the hands of the corporation, and taxing only so much of the stockholder's dividends as corresponds to the corporate income not assessed, the tax is invalid. P. 714.

Reversed.

ERROR to a judgment of the District Court (January 9, 1925) in favor of Fred Miller and Elise K. John, as executors of the will of Ernest G. Miller, in their suit against the City of Milwaukee to recover the amount of income taxes alleged to have been unconstitutionally collected under the laws of Wisconsin, from their testator.

Mr. A. W. Schutz for plaintiffs in error.

Mr. Walter J. Mattison, with whom *Mr. John M. Niven* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to recover the amount of taxes alleged to have been unconstitutionally exacted from the plaintiffs' testator. The facts are agreed and the only question is the validity of the tax under the Constitution of the United States. The testator held stock in Wisconsin corporations that owned United States bonds issued under the Acts of April 24, and September 24, 1917. The interest upon these bonds was credited by the corporations to their surplus, and subsequently was distributed to the stockholders in dividends of stock or cash. The corporations paid a tax upon their income, except, of course, upon that received from the bonds of the United States. But this exemption was met in the laws of Wisconsin by a provision that while the stockholders were not taxed upon dividends received from corporations the income of which was assessed, yet if only part of the income of the corporation was assessed, only a corresponding part of the dividends or income received therefrom should be deducted from the income taxed to the stockholders. The law also provides that taxable income shall include all dividends from the earnings of corporations, whether in cash or stock. The testator was taxed in accordance with the statute, against his protest that the attempt to make up from him what the State could not take from the corporations was forbidden by the Constitution and laws of the United States. The District Court ruled that the action could not be maintained and the case was brought directly to this Court.

There is no doubt that in general a corporation is a nonconductor that cuts off connection between dividends to its stockholders and the corporate funds from which the dividends are paid. *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103. A system of taxation that applied to stockholders of all corporations equally might tax, we assume for purposes of argument, the stockhold-

ers of a corporation that had invested all its property in United States bonds. But it would be a different matter if the State selected such corporations, supposing a number of them to exist, and taxed their stockholders alone. It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the Acts of Congress permit. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members. A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts. See *Home Insurance Co. of New York* v. *New York,* 134 U. S. 594, 598; *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505; *United States Grain Corporation* v. *Phillips,* 261 U. S. 106, 113.

Judgment reversed.

By agreement, the decision in this case controls the decision in No. 74, *Chas. A. Miller, et al.* v. *City of Milwaukee;* No. 75, *Emil P. Miller* v. *City of Milwaukee,* and No. 76, *Harry G. John* v. *City of Milwaukee.*

MR. JUSTICE BRANDEIS, concurring.

I agree that the judgment must be reversed; but on a different ground. It was stipulated before the state board which upheld the tax that it was levied upon "that portion of the mentioned dividends which were directly declared from interest accruing from United States Bonds issued under and by virtue of the Acts of Congress passed April 24th, 1917 and September 24th, 1917." A similar stipulation was entered into in the court below. Thus the dividends were earmarked as the direct proceeds of the interest on the war bonds. The later Act provided, in terms, the former in substance, that the bonds "shall be exempt both as to principal and interest from all taxation now or hereafter imposed by . . . any state . . . upon the income or profits of individuals, partnerships, associations or corporations." The provision creating the exemption was clearly within the power of Congress "to borrow money on the credit of the United States," Art. I, § 8, Par. 2, and was also within its war powers. As a matter of statutory construction, a dividend paid directly from the interest seems to me within the exemption expressly conferred. The tax levied was, therefore, void because it violated that exemption.

I do not think it can properly be said that the state statute discriminates against Government bonds. The statute makes no reference to them or to any particular class of securities. The tax imposed upon the stockholder results, not from discrimination practiced by a State against the Federal Government, but from the fact that the corporation happened to earn its dividend from securities on which, under the Wisconsin law, it was not required

to pay a tax. Compare *State ex rel. Columbia Construction Co.* v. *Tax Commission,* 166 Wis. 369. The operation and effect of the statute would be precisely the same if the dividend had been paid out of any other corporate income exempt from the state tax; from interest upon other tax exempt bonds, if any; or out of income from the part of a business carried on in another State, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *State ex rel. Arpin* v. *Eberhardt,* 158 Wis. 20; *Van Dyke* v. *Milwaukee,* 159 Wis. 460, 466, or out of rentals or mine royalties received from land without the State, or out of profits received from the sale of property having a situs out of the State, Wisconsin Statutes, 71.02(3) (see *State ex rel. Mariner* v. *Hampel,* 172 Wis. 67); or out of dividends received from banks, Wisconsin Statutes, 71.05(1)(e).

The purpose of the Legislature was solely to prevent double taxation by the State of Wisconsin, of the income received by individuals in the form of dividends. The deduction allowed is limited to that necessary to prevent double taxation. Under the Wisconsin law as originally enacted in 1911 the individual was allowed to deduct from the aggregate income on which the tax was payable all "dividends or incomes received . . . from stocks or interest in any corporation . . . , the income of which shall have been assessed under the provisions of this act." The proviso here in question, namely: "that where only part of the income of any corporation . . . shall have been assessed under the act only a corresponding part of the dividend or income received therefrom shall be deducted," was added in 1913, four years before the United States entered the World War. At that time there were substantially no Government bonds outstanding except those used by national banks as the basis for note issues. And in view of the exemptions enumerated above, it can not well be said, even after the war, that the tax upon dividends paid out of interest on United

States bonds furnishes the most conspicuous instance of the operation of the section in question.

Moreover, under the Wisconsin law, the source out of which the dividend was declared is immaterial. The thing received as income is taxable to him who receives it although the fund or property out of which it was paid was exempt from taxation in the hands of the payor. "It is the relation that exists between the person sought to be taxed and the property claimed as income to him that determines whether there shall be a tax." *State ex rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commission,* 166 Wis. 287, 290. Compare *Paine* v. *City of Oshkosh,* 190 Wis. 69.

MR. JUSTICE STONE concurs in this opinion.

STEAMSHIP WILLDOMINO *v.* CITRO CHEMICAL COMPANY.

STEAMSHIP WILLDOMINO *v.* PFIZER & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 29, 30. Argued January 22, 1926.—Decided January 3, 1927.

1. An inexcusable deviation from her permitted course renders a vessel liable as an insurer for any damage suffered by the cargo. P. 725.
2. A steamship, bound from Messina, Sicily, to New York, put into the Azores for repairs, and thence cleared for New York with a supply of coal known by her owners and officers to be grossly inadequate for the trip, and, after sailing for some days in that direction, until the inadequacy became manifest, changed her course to North Sydney, Nova Scotia, where she recoaled before proceeding to her destination. *Held* that there was an inexcusable deviation, even if she had a right to go to North Sydney from the Azores and so intended when leaving there, since in that event the preliminary sailing towards New York was unjustifiable; whereas, if the duty

was to sail direct to New York, the change of course to North Sydney was due to negligence in not supplying fuel. P. 726.

3. An emergency sufficient to excuse a departure cannot arise out of circumstances deliberately planned nor from gross negligence. P. 727.

300 Fed. 5, affirmed.

CERTIORARI (266 U. S. 297) to decrees for damages to cargo, entered by the Circuit Court of Appeals, reversing the District Court, in proceedings *in rem* against a vessel.

Messrs. George C. Sprague and *Francis Rawle,* with whom *Messrs. George W. Betts, Jr.,* and *Joseph W. Henderson* were on the brief, for petitioner.

The voyage of the *Willdomino* was by stages. The stage beginning at Lisbon was to North Sydney; it was not to New York. The vessel was ordered by her owner to go to North Sydney, and these orders were literally obeyed. A turbine breakdown interrupted the stage from Lisbon to North Sydney and caused the vessel to put into Ponta Delgada, Azores Islands. Her orders were not changed at Ponta Delgada, and upon completion of repairs she resumed the stage of her voyage to North Sydney. She had sufficient bunker coal to reach North Sydney both upon sailing from Lisbon and from Ponta Delgada. She reached North Sydney with coal to spare. The Circuit Court of Appeals, therefore, erred in holding that she was unseaworthy upon sailing from Lisbon and from Ponta Delgada because of insufficiency of bunker coal to reach New York.

The respondent's cargo was damaged by sea-water as a result of the stranding of the *Willdomino,* which was caused by negligent navigation. The alleged unseaworthiness was in no sense causally connected with the stranding and the consequent damage to the cargo. Both courts below so found.

The voyage to North Sydney was not a deviation. The liberties of the bills of lading gave the *Willdomino* the right to go to North Sydney for sufficient bunkers to

carry her to New York. The liberty of bunkering in the printed clause was not narrowed by the clause of handwriting. "Filling up" refers only to cargo and not to fuel for bunkers. Where the bill of lading contains a clause providing that the vessel may call "at any port or ports in or out of the customary route in any order," or other words of similar import, it is uniformly held that she is entitled to proceed to and stop at ports which are off the regular and customary route (if such changes are reasonable). Such a departure is not a deviation, because the parties have agreed that it shall not be. *South Atl. S. S. Line* v. *London Stores Co.*, 255 Fed. 306; *The Blandon*, 287 Fed. 722; *The Panola*, 1925 A. M. C. 1173; *Akbar & Sons* v. *Persian S. S. Co.*, 11 Com. Cas. 219; *Attorney General* v. *Smith & Co.*, 34 T. L. R. 566; *Citta di Messina*, 169 Fed. 472; *Austrian S. S. Co.* v. *Calafiore*, 194 Fed. 377; *Emelia S. de Perez*, 187 Fed. 361, affirmed 288 Fed. 1019; *The Tokuyo Maru*, 7 Fed. (2d) 889.

The liberties of the bills of lading gave the *Willdomino* the right (had she desired so to do) to take sufficient bunkers at North Sydney to get away from New York, as well as to get there. *Austrian Union S. S. Co.* v. *Calafiore*, 194 Fed. 377; *Shipping Board* v. *Bunge & Born, Ltd.*, 41 T. L. R. 73.

Admitting for the purpose of the argument that the ship was unseaworthy upon sailing from Lisbon and from Ponta Delgada because of an insufficient coal supply, and that the stranding was the result of faults or errors in navigation, yet, since there was no causal relation between such unseaworthiness and the stranding which caused the damage to respondent's cargo, neither the ship nor the shipowner was by such unseaworthiness deprived of the protection of the Harter Act. *International Nav. Co.* v. *Farr Mfg. Co.*, 181 U. S. 218; *The Southwark*, 191 U. S. 1; *The Wildcroft*, 201 U. S. 378; *The Turret Crown*, 282 Fed. 354; 284 Fed. 439; 297 Fed. 766. Also, English cases:

The Europa, [1908] 98 L. T. R. 246; *Havelock* v. *Geddes,* (1809) 10 East 555; *Kish* v. *Taylor,* (1912) A. C. 604; *Atlantic Shipping Co.* v. *Dreyfuss,* (1922) A. C. 250; *Elder & Co.* v. *Patterson,* (1924) A. C. 522. See also the British "Carriage of Goods by Sea Act, 1924." This Act follows the Hague Rules of 1921 and 1922. A diplomatic conference on maritime law was held at Brussels in October, 1922, and it adopted the Hague Rules with slight modifications. See Scrutton, Charter Parties and Bills of Lading, 12th ed., 1925, App. IV.

The interpretation for which we contend will bring the law in the United States into conformity with the law of Great Britain. *The Eliza Lines,* 199 U. S. 119; *Queen Ins. Co.* v. *Globe Ins. Co.,* 263 U. S. 487.

The Harter Act should be so construed as to include the rule of causal relation between the unseaworthiness and the disaster causing cargo damage. *The Irrawaddy,* 171 U. S. 187; *The Southwark,* 191 U. S. 1; *The Jason,* 225 U. S. 32; *International Nav. Co.* v. *Farr Mfg. Co.,* 181 U. S. 218; *The Turret Crown,* 282 Fed. 354; Parsons, Shipping, vol. I, p. 320; 16 Harv. Law Rev. 157; *Havelock* v. *Geddes,* 10 East 555. The Harter Act is concerned only with seaworthiness in which deviation plays no part. The sole effect of deviation is to displace the bill of lading. *The St. Johns,* 263 U. S. 119.

The petitioner took reasonable care of the damaged merchandise after the stranding.

Mr. D. Roger Englar, with whom *Mr. James D. Carpenter, Jr.,* was on the brief, for respondents.

The court below found that it was the deliberate purpose of the petitioner not to take on board sufficient coal to carry the vessel to New York, but only barely enough to carry her to North Sydney; and to conceal this intent and put into North Sydney as a port of refuge under a necessity created by the petitioner itself. The court found that the vessel was, therefore, unseaworthy, and

that this unseaworthiness resulted directly from the owner's cable instructions. These findings are fully sustained by the evidence.

Having failed to use due diligence to make the *Willdomino* seaworthy as required by § 3 of the Harter Act, 27 Stat. 445, and having on the contrary, directed her to sail in an unseaworthy condition, the petitioner, as owner of the vessel, cannot invoke the protection of that section, but is liable for damage to cargo resulting from the negligence of its servants. *The Jason*, 225 U. S. 32; *International Nav. Co.* v. *Farr Mfg. Co.*, 181 U. S. 218; *The Wildcroft*, 201 U. S. 378; *The Southwark*, 191 U. S. 1.

Petitioner's argument is that it would be absurd to hold it responsible, on account of the shortage of fuel, for damage which did not result from that cause. This argument is plausible enough on its face, but it is based on a misstatement of the facts. The petitioner was not held liable because its vessel was short of fuel, but because its servants were guilty of negligence in navigation, which directly caused the damage to respondents' cargo. The basis of petitioner's liability is the fundamental principle of all law, that one who negligently damages the property of another is liable for the damage; together with the rule of *respondeat superior*, which extends this liability to include the negligence of his servants. It is true that Congress has created a statutory modification of this general liability, of which the petitioner might have obtained the benefit by complying with the conditions upon which it is granted. Not having complied with these conditions, the petitioner, of course, cannot obtain the benefits of the statute.

The very structure of the third section of the Harter Act clearly indicates that there is no causal connection contemplated between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence

to make the ship seaworthy is made the condition of exemption in respect of negligent navigation. If the Act were based on causal relation, one would expect that a shipowner who had used due diligence to make his ship seaworthy would be relieved from liability for losses resulting from unseaworthiness. The Act does not say this, however, and is not so construed. *The Carib Prince,* 170 U. S. 655.

Owing to the deviations of the *Willdomino* from the voyage specified in the bills of lading, the petitioner has forfeited all protection under the clauses of its bills of lading, and is liable as an insurer of libellants' goods. *The Citta di Messina,* 169 Fed. 472; *The Dunbeth,* (1897), P Div. 133; *Scaramanga* v. *Stamp,* 5 C. P. Div. 295; *Davis* v. *Garrett,* 6 Bing. 716; *Leduc* v. *Ward,* 20 Q. B. Div. 475; *Bond* v. *The Cora,* 3 Fed. Cas. No. 1620; *Johnson* v. *New York Cent. R. R.,* 33 N. Y. 610; *Knox* v. *The Ninetta,* 14 Fed. Cas. 827; Carver, Carriage of Goods by Sea, 6th ed., p. 398; Am. & Eng. Enc. L., vol. 7, p. 208; *Morrison* v. *Shaw,* (1916), 2 K. B. 783; *South Atlantic S. S. Line* v. *London-Savannah Co.,* 255 Fed. 306; *The Blandon,* 287 Fed. 722; *Emelia S. de Perez,* 1923 Am. Mar. Cas. 42.

The *Willdomino* deviated on the voyage from Ponta Delgada to North Sydney in not following the direct route; the uncontradicted testimony of the officers of the *Willdomino* establishes that they followed the course to New York for several days and then changed their course for North Sydney. *Michaels* v. *Railroad,* 30 N. Y. 564; *Constable* v. *Nat. S. S. Co.,* 154 U. S. 51; *Hostetter* v. *Park,* 137 U. S. 30; Carver, Carriage of Goods by Sea, 6th ed., p. 393; 9 Amer. & Eng. Encyl. of Law, pp. 419–421; 26 Cyc. 625. In proceeding to North Sydney instead of to New York direct, the *Willdomino* would have been guilty of an unjustified deviation, even if she had proceeded from Ponta Delgada to North Sydney by the most direct route.

As found by the Circuit Court of Appeals, the petitioner is liable, irrespective of unseaworthiness or deviation, because of its gross neglect to care for and preserve the respondents' cargo after the disaster.

Mr. Justice McReynolds delivered the opinion of the Court.

Respondents instituted proceedings *in rem* against the "Willdomino," a British vessel, to recover the value of five hundred and three (168 and 335) casks of citrate of lime owned by and consigned to them, which she accepted June 10, 1920, at Messina, Sicily, for delivery at New York, subject to issued bills of lading. After leaving Messina the vessel put in at Gibraltar, Lisbon, Ponta Delgada (The Azores), North Sydney (Nova Scotia) and Halifax. While passing between the last-named ports, through negligent navigation, she struck a reef or submerged object; water filled her forward compartment and respondents' goods were so damaged that they refused acceptance at destination. The causes were heard upon the same record and present identical questions. In the District Court petitioner prevailed; but the Circuit Court of Appeals thought otherwise and entered judgments for the damages sustained. 300 Fed. 5.

The petition for certiorari alleges that the causes involve three questions—

1. When in normal condition citrate of lime contains sixty-four per centum of citric acid; the cargo offered for delivery at New York contained sixty per centum of citric acid. Was it in sound condition?

2. Having regard to the bills of lading, did the "Willdomino" deviate when she went to North Sydney?

3. Must there be causal connection between the lack of due diligence to make a vessel seaworthy and the accident from which damage results in order to deprive the

vessel of the exemptions granted by § 3 of the Harter Act?*

We confine our consideration to the points specified by the petition and agree with the conclusions of the Circuit Court of Appeals concerning the essential facts, although they are radically different from those of the trial court. It is unnecessary now to discuss the evidence—that was adequately done below.

The first of the above-stated questions has not been pressed here and is either abandoned or inconsequential.

The Circuit Court of Appeals, we think, rightly held that the "Willdomino" made an inexcusable deviation from the permitted course when she went to North Sydney. Consequently, she became liable as an insurer for any damage suffered by the cargo. *St. Johns Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119, 124; *The Citta di Messina,* 169 Fed. 472, 474, 475; *The Sarnia,* 278 Fed. 459.

Except as to inserted name of the consignee and number of casks the printed bills of lading were identical. They acknowledge receipt of ". . . casks citrate of lime" "for shipment, in apparent good order and condition, from Ferd. Baller & C., to be transported by the good

* "SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." Act of February 13, 1893, (the Harter Act) c. 105, 27 Stat. 445.

Steamship Willdomino to New York, with liberty to call at intermediate ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes." And they provide: "The ship has liberty of filling up and/or bunkering at any port or ports in or out of the way." "Filling up only in ports on the way westwards of New York," is written at the bottom of each bill, and all agree that *of* therein really means *to*.

The "Willdomino" left Messina with five hundred and sixty-nine tons of coal—not sufficient under any circumstances to carry her to New York. At Gibraltar, a customary coaling port, she took on four hundred tons and left there for Lisbon with seven hundred and fifty-six tons in her bunkers. From Lisbon she cleared for New York—two thousand, nine hundred and five miles away—with but six hundred and fifty-one tons, an inadequate amount. When five days out from Lisbon an accident befell the high-pressure turbine and she put into Ponta Delgada for repairs. Finding that port not properly equipped therefor, the master decided to proceed on the low-pressure turbine alone. She took on two hundred and fifty tons of coal and cleared for New York—two thousand, two hundred and ninety miles—with six hundred and twenty-nine tons on board. This was grossly inadequate for that distance, as her officers knew. After proceeding five or six days toward New York it became manifest that there was not enough coal to make that port and thereupon she radically changed her course and proceeded to North Sydney, where she arrived with sixty-two tons.

It is clear enough that for some reason not quite definitely disclosed the officers of the vessel under direction of the owners, while realizing that there was not enough coal on board for such voyage, wished to create the impression that she left Ponta Delgada bound directly

for New York, when in truth they intended to take her to North Sydney under pretense of an emergency.

In such circumstances by proceeding for five or six days in the direction of New York the vessel deviated from any permissible course to North Sydney, even if it be true, as her counsel now maintain, that she had the right to go and intended to proceed to the latter port from Ponta Delgada.

If, on the other hand, the vessel started from Ponta Delgada with the intention of going to New York, the only emergency claimed to justify departure from the ordinary course and procedure to North Sydney arose from wilful failure to take on sufficient coal.

An emergency sufficient to excuse a departure cannot arise out of circumstances deliberately planned nor from gross negligence.

Whether the intention was to proceed directly from Ponta Delgada to New York, as counsel for the petitioner are said to have maintained below, or to North Sydney, as they now insist, there was inexcusable departure.

"In the law maritime a deviation is defined as a 'voluntary departure without necessity or any reasonable cause from the regular and usual course of the ship insured.'" *Constable* v. *National Steamship Co.*, 154 U. S. 51, 66. "The voyage must be prosecuted without unnecessary delay or deviation. The shipowner's undertaking is that he will be diligent in carrying the goods on the agreed voyage and will do so directly without any unnecessary deviation." *Carver on Carriage of Goods by Sea*, 6th Ed., 393.

Nothing in the present bills of lading suggests that the vessel might wander about the sea, heading first for one port, and then without adequate reason for another. If the "Willdomino" had the privilege of going from Ponta Delgada to North Sydney and intended so to do, it was

her duty to take the ordinary course. This she did not do.

What has been said of the second question renders it unnecessary to discuss the third.

The decrees of the Circuit Court of Appeals are

Affirmed.

HEIRS OF SAMUEL GARLAND, DECEASED, *v.* CHOCTAW NATION.

PITCHLYNN ET AL., HEIRS-AT-LAW, *v.* CHOCTAW NATION.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 42, 43. Argued December 1, 2, 1926.—Decided January 3, 1927.

1. Upon a reference to determine a claim for services on a *quantum meruit* basis, when the Court of Claims finds the amounts already paid the claimant, and dismisses his petition, or renders judgment for an additional sum, this is a determination that he was not entitled to more, although there is no definite finding of the value of the services. P. 730.
2. In determining the value of services rendered the Choctaw Nation, the Court of Claims was not bound by opinions of the Choctaw legislature or executive officers. P. 731.

59 Ct. Cls. 768; *Id.* 796, affirmed.

APPEALS from decisions of the Court of Claims on claims for services against the Choctaw Nation, referred to that Court by Acts of Congress. See *Garland's Heirs* v. *Choctaw Nation,* 256 U. S. 439.

Mr. Harry Peyton for appellants, in No. 42.

Messrs. Harry Peyton and *Thomas P. Gore* for appellants, in No. 43.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell,* and *Messrs. George T. Stormont,* and *Hampton Tucker* were on the brief, for appellee, in Nos. 42 and 43.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These causes, although heard separately and upon different records, may be disposed of conveniently by one opinion.

Samuel Garland, Peter P. Pitchlynn and two others were appointed delegates of the Choctaw Nation under an Act of the Legislative Assembly approved November 9, 1853, and charged with the duty of pressing to settlement a claim against the United States for ceded lands. They performed valuable services and each of them received therefor considerable sums of money. Their heirs sought large additional payments. Finally Congress referred the matter to the Court of Claims. The Act of June 21, 1906, c. 3504, 34 Stat. 325, 345, provides—

"That the Court of Claims is hereby authorized and directed to hear and adjudicate the claims against the Choctaw Nation of the heirs of Peter P. Pitchlynn, deceased, and to render judgment thereon in such amounts, if any, as may appear to be equitably due. Said judgment, if any, in favor of the heirs of Pitchlynn, shall be paid out of any funds in the Treasury of the United States belonging to the Choctaw Nation, said judgment to be rendered on the principle of *quantum meruit* for services rendered and expenses incurred. Notice of said suit shall be served on the governor of the Choctaw Nation, and the Attorney-General of the United States shall appear and defend in said suit on behalf of said nation." A like Act, approved May 29, 1908, c. 216, 35 Stat. 444, 445, directed adjudication of the claim of Samuel Garland, deceased.

Garland's heirs brought suit in the Court of Claims September 3, 1908. It held against them upon the theory that the delegation which represented the Choctaw Nation should be treated as a unit and as such had been fully

paid for the entire service. Upon appeal, this Court reversed the judgment and sent the cause back, after saying—"The contention under the facts disclosed in the petition is technical. The petition showed services rendered and, if the petition be true, valuable services—and for them there should have been recovery if the Nation was liable, and we think it was. How much we do not say nor did the Court of Claims consider, it being of opinion that the Nation was not liable for anything. Upon the return of the case it may determine the amount due Garland, if anything, dependent upon what his services contributed in securing the congressional appropriation." *Garland's Heirs* v. *Choctaw Nation,* 256 U. S. 439, 445.

Much evidence has been presented in both causes and there are elaborate findings. The court held the heirs of Garland—No. 42—were not entitled to recover anything, and dismissed their petition. It rendered judgment for $3,113.92 in favor of Pitchlynn's heirs—No. 43. The causes are here by appeals allowed, respectively, January 19 and February 2, 1925.

In neither cause did the Court of Claims definitely find the value of the services rendered by the delegate, but it ascertained and stated the sums received by each of them. By dismissing the petition of Garland's heirs, it adjudged, in effect, that he had received full compensation; and the judgment in favor of Pitchlynn's heirs for $3,113.92 determined that the amount theretofore received plus such recovery would amount to full compensation for his services.

We think the findings of fact sufficient to permit us to dispose of the causes, and accordingly deny the motion to remand.

The enabling Acts very clearly provide for recoveries upon the principle of *quantum meruit* for services rendered and expenses incurred. The Court of Claims was not

bound to accept opinions of the legislature or executive officers of the Choctaw Nation; its duty was to determine for itself what the services were worth. After consideration of the evidence it reached the above-stated conclusions, and we find no adequate reason for overturning the result.

The judgments below are

Affirmed.

DE LA METTRIE ET AL. *v.* DE GASQUET JAMES ET AL.

KEANE, RECEIVER, *v.* DE GASQUET JAMES ET AL.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 54, 55. Argued December 6, 1926.—Decided January 3, 1927.

1. Under § 9–e of the Trading with the Enemy Act, a debt to one who is not a citizen of the United States can not be allowed unless it "arose with reference to money or property" held by the Alien Property Custodian or the Treasurer of the United States. P. 732.
2. The debts in this case,—consisting of judgments against a person whose interest in a fund was seized by the Custodian—did not so arise. *Id.*
3. A receiver appointed by a New York Court in proceedings supplementary to execution, to collect the judgments, was in no better position than the judgment creditors. Trading with the Enemy Act, § 9–f. P. 733.

55 App. D. C. 354; 6 F. (2d) 479, affirmed.

APPEALS from decrees of the Court of Appeals of the District of Columbia which sustained the Supreme Court of the District in refusing to permit Keane, receiver, to intervene in a suit under the Trading with the Enemy Act, and in dismissing the suit after hearing. The plaintiffs, Pauline André de la Mettrie and George Pratt de Gasquet James, in 1915, had recovered judgments against the defendant Elizabeth Pratt de Gasquet James, in the settlement of her accounts as executrix of her husband's

will, in a surrogate's court in New York; and sought by this suit to reach, and apply to the judgments, the interest of the defendant James in a voluntary trust created by herself in 1887, before her husband's death, and which had been taken over by the Alien Property Custodian. The other appellant, Keane, had been appointed receiver of the property of the defendant James, in proceedings in New York supplementary to the judgment.

Mr. J. Noble Hayes, with whom *Mr. Guy H. Johnson* was on the brief, for the appellants.

Mr. Mansfield Ferry, with whom *Messrs. Frank Davis, Jr., S. M. Stellwagen, William J. Neale,* and *Victor Hugo Duras* were on the brief, for the appellee James.

Solicitor General Mitchell for Sutherland, Alien Property Custodian, submitted. *Assistant Attorney General Letts* and *Mr. Dean Hill Stanley,* Special Assistants to the Attorney General, were also on the brief.

Mr. Justice McReynolds delivered the opinion of the Court.

The challenged decrees were entered March 2, 1925, 6 Fed. (2d) 479. Both causes had been heard upon a single record.

In No. 54, appellants, citizens of France, sought to recover from the Alien Property Custodian certain funds seized by him November 5, 1918, as the property of an alien enemy. They relied upon § 9, Trading with the Enemy Act, as amended June 5, 1920, c. 241, 41 Stat. 977. The court below held that the claim did not arise with reference to money or property held by the Custodian or by the Treasurer of the United States and affirmed the decree of the trial court which dismissed the bill. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591. Considering the facts disclosed and the definite terms of the statute, this action was clearly right. Subsection (e) of § 9 provides—

"No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder."

No. 55 is a separate appeal by a receiver. The appellants in No. 54 instituted in the Supreme Court, New York County, supplemental proceedings for the purpose of enforcing judgments which they held against Mrs. James and on June 18, 1923, that court appointed David Keane receiver of all the debtor's property. Thereafter he asked to be made party to cause No. 54, claiming that by reason of such appointment he had an interest in the fund held by the Custodian. The trial court denied this application and upon appeal the court below affirmed that action. The claim is without merit. Subsection (f) of § 9, Trading with the Enemy Act, provides: "Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." The appointment of the receiver gave him no better position than the one occupied by the judgment creditors—the New York court had no jurisdiction over funds held by the Custodian.

The decrees below are

Affirmed.

In No. 55 MR. JUSTICE BRANDEIS, MR. JUSTICE SANFORD and MR. JUSTICE STONE concur in the result.

UNITED STATES *v.* GETTINGER AND POMERANTZ, COPARTNERS.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 537. Argued November 30, 1926.—Decided January 3, 1927.

1. The District Court is without jurisdiction of an action to recover from the United States the amount of a fine imposed on the plaintiffs, and paid under protest, under a penal statute afterwards adjudged by this Court to be unconstitutional. P. 735.
2. The payment of such fine under a plea of *nolo contendere,* with an attempted reservation of a right to reclaim it if the statute on which the indictment was based were declared unconstitutional by this Court did not create any contract with the United States. P. 735.

Reversed.

APPEAL from a judgment of the District Court awarding damages against the United States in a suit under the Tucker Act to recover, with interest, the amount of a fine imposed under § 4 of the Lever Act, which was afterwards adjudged unconstitutional.

Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Randolph S. Collins,* Attorney in the Department of Justice, were on the brief, for the United States.

Messrs. Isadore Bookstein and *George A. King,* with whom *Mr. Joseph Greenberg* was on the brief, for the defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The District Court entered final judgment for defendants in error March 9, 1925, and certified that the only question involved was one of jurisdiction.

By an indictment returned into the United States District Court, Northern District of New York, February 1920, defendants in error were charged with violating § 4 of the Lever Act, c. 53, 40 Stat. 276, 277, as amended October 22, 1919, c. 80, 41 Stat. 297, 298, by selling women's

apparel at unjust and unreasonable rates. They entered pleas of *nolo contendere* October 8, 1920, and each undertook to "waive any and all claims which I now have or hereafter may have to any and all fines which the court may see fit to impose upon me upon such plea, except in the event that the so-called Lever Act under which said indictment is founded shall be declared unconstitutional by the Supreme Court of the United States." The court adjudged them guilty and imposed a fine of five thousand dollars. This was paid to the clerk and by him passed into the Treasury of the United States.

February 28, 1921, this court held § 4 of the Lever Act invalid. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. April 25, 1924, the court below undertook to set aside the judgment of conviction and sentence entered there October 8, 1920.

The present proceeding, begun May 24, 1924, set up the claim that under the above-stated facts the United States became obligated to repay to plaintiffs in error the sum of five thousand dollars with interest. A demurrer which raised the question of the court's jurisdiction was overruled and the matter come here by direct writ of error.

The attempt by plaintiffs in error to reserve rights if the Lever Act should be held unconstitutional amounted at most to a protest, possibly sufficient to overcome the suggestion of an estoppel, but no contract arose out of it which obligated the United States to return the fine. Neither the court nor any federal officer had authority to make such an agreement. The controlling general principles are sufficiently stated in *Russell* v. *United States*, 182 U. S. 516, 530; *United States* v. *Holland-America Lijn*, 254 U. S. 148; *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212.

The court below was without jurisdiction and should have dismissed the complaint. Its judgment must be reversed.

Reversed.

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